Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

October Term, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

VS.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves Caller ID service and the propriety of the FCC's preempting California's mechanism to protect the privacy and safety of sixteen million Californians living in households with nonpublished telephone numbers.

The questions presented are:

1. Whether the FCC's preemption under the Supremacy Clause (U.S. Const., Art. VI, cl. 2) of California's mechanism to protect the privacy and safety of its citizens – a preemption which would compel the disclosure to the general public of the nonpublished home telephone numbers of millions of California citizens without their knowledge and consent starting June 1, 1996 – is permissible in light of the clear jurisdictional limitations placed on the FCC by 47 U.S.C. § 152(b)(1), the fact that the protection of general privacy rights has traditionally been left to the states, the fact that approximately 93 per cent of the affected telephone calls are intrastate in nature, and the fact that California's privacy protection mechanism does not substantially affect the FCC's regulation of interstate telecommunications.

2. Whether the FCC's preemption under the Supremacy Clause (U.S. Const., Art. VI, cl. 2) of California's mechanism to protect the privacy and safety of its citizens – a preemption which would compel the disclosure to the general public of the nonpublished home telephone numbers of millions of California citizens without their knowledge and consent starting June 1, 1996 – violates free speech and privacy rights protectable under the First, Fourth, Fifth and Ninth Amendments to the United States Constitution.

PARTIES

The proceedings below consisted of four consolidated petitions for review of the FCC's Caller ID orders, two filed by California, one by AT&T Corp. ("AT&T") and one by the Competitive Telecommunications Association ("CompTel"). AT&T and CompTel raised issues unrelated to those raised by California.

The parties participating in California's petitions were:

Petitioners
People of the State of California
Public Utilities Commission of the State of California

Intervenors Supporting California
California Alliance Against Domestic Violence
Consumer Action
Consumer Federation of America
Family Violence Prevention Fund
National Association of Regulatory Utility Commissioners
National Association of Social Workers
Pennsylvania Public Utility Commission
Southern California Coalition on Battered Women
Toward Utility Rate Normalization

Respondents
Federal Communications Commission
United States of America

Intervenors Supporting Respondents and Opposing California
GTE-California
Pacific Bell

Other Parties Not Participating in California's Petitions
Ad Hoc Telecommunications Users Committee
Ameritech Operating Companies
AT&T Corp.
Bell Atlantic Telephone Companies

PARTIES – Continued

BellSouth Corporation
Competitive Telecommunications Association
GTE Service Corporation
MCI Telecommunications Corporation
National Association of State Utility Consumer Advocates
National Telephone Cooperative Association
Southwestern Bell Telephone Company
United States Telephone Association
U S West Communications

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PETITION FOR A WRIT OF CERTIORARI

The People of the State of California and the Public Utilities Commission of the State of California ("California" or "CPUC") respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 31, 1996.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at *California v. FCC*, 75 F.3d 1350 (9th Cir. 1996), and is reproduced in the Appendix, A1-A32.[1] The challenged orders of the FCC are reported at *Report and Order and Further Notice of Proposed Rulemaking* ("*Report and Order*"), 9 FCC Rcd 1764 (1994), and *Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking* ("*Reconsideration Order*"), 10 FCC Rcd 11700 (1995), and are reproduced at A33-A86 and A87-A175, respectively. The CPUC decision preempted in part by the FCC's orders is reported at *Re Pacific Bell*, 44 Cal.P.U.C.2d 694, 134 P.U.R.4th 184 (1992), is excerpted at A176-A253, and is lodged in its entirety with the Clerk.

JURISDICTION

The judgment of the Ninth Circuit was entered on January 31, 1996. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution, the First, Fourth, Fifth and

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[1] As herein used, numbers preceded by the letter "A" refer to pages in the appendix to this petition.

Ninth Amendments to the United States Constitution, the Declaration of Rights (Art. I, § 1) of the California Constitution, and 47 U.S.C. § 152(b)(1). These constitutional and statutory provisions are fully set forth at A342-A345.

STATEMENT OF THE CASE

A telephone customer who purchases Caller ID service is able to see the calling party's telephone number on a small screen attached to or built into the telephone, unless the caller blocks disclosure. However, because Caller ID can disclose the caller's telephone number to third parties every time a telephone call is made, it affects all telephone users, whether or not they purchase Caller ID service.

In June, 1992, after extensive evidentiary hearings, the CPUC issued a decision authorizing California telephone companies to transmit calling party numbers and to offer intrastate[2] Caller ID service. However, confronted with evidence of potential abuses of Caller ID service by telemarketers, those engaging in discriminatory "redlining" practices, domestic abusers, stalkers, and others, A190, the CPUC required that the service could only be provided with blocking mechanisms designed to protect the privacy and safety of all California citizens. *Re Pacific Bell,* A176-A253. The CPUC's blocking regime rested on the right of privacy enumerated in

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[2] Under the Communications Act of 1934, the CPUC has authority over *intrastate* common carrier communications by wire or radio and the FCC has authority over *interstate* common carrier communications by wire or radio. *See* 47 U.S.C. §§ 152(a) and 152(b)(1). So far as relevant here, the newly enacted Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Feb. 8, 1996), does not alter this division of authority.

the California Constitution, Cal. Const., Art. I, § 1. A197-A198, A207, A212, A222, A228, A229, A343.

The privacy protections established by the CPUC included a choice of free per call blocking – which would require the caller to dial *67 before each call in order to block disclosure of the caller's telephone number – or free per line blocking – which would block disclosure of the caller's number on all calls unless the caller overrode the blocking for a particular call by first dialing *82. A211-A212.

The CPUC also concluded that the default blocking option for those customers who did not affirmatively communicate their choice to the telephone company would be per line blocking for emergency service organizations and for subscribers who pay monthly charges for nonpublished and unlisted telephone numbers,[3] and per call blocking for all other subscribers. A212-A214, A222, A229.

The default only applied to those customers who failed to communicate a choice of blocking option to the telephone company, and the CPUC provided that customers dissatisfied with their initial blocking option, whether or not obtained by default, could have one free change of blocking option,

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[3] Nonpublished numbers are not available to the general public from any source, A324-A332, A136 n. 119, and unlisted numbers are not published in telephone directories but are available from directory assistance, *id.* Approximately 99 per cent of California numbers not listed in white pages directories are nonpublished and approximately one per cent are unlisted. Pacific Bell, California's largest local exchange carrier, reports that it has 9,746,253 residential telephone lines, of which 4,724,942 are nonpublished and 58,676 are unlisted. A338-A339. Although California's per line blocking default also protects unlisted subscribers and emergency service organizations, for simplicity's sake California here addresses its argument only to nonpublished subscribers.

assuming they knew to request it. A215-A216. The CPUC also required telephone companies to conduct a vigorous customer education program to inform customers about Caller ID and how to protect their privacy. A233-A237.

Without appealing the decision, California telephone companies withheld offering the service and asked the FCC to preempt California's privacy protections and to establish per call blocking as the sole blocking option available nationally. *See, e.g.*, A143. They argued that Caller ID service would be more marketable and hence more profitable to telephone companies if fewer people blocked disclosure of their telephone numbers. *Id.* In April, 1994, the FCC issued its *Report and Order*, requiring the transmission of calling party numbers to interconnecting carriers for ultimate disclosure by the terminating carrier, A44, and providing that the only blocking option that would be available nationally would be per call blocking. A62-A64.

California petitioned for reconsideration, arguing that the FCC should establish an interstate regime which defers to the blocking regime established by the originating state, subject to minimum federal privacy standards. A119-A120. Pointing out that 48 states and the District of Columbia had already authorized Caller ID service (41 of them with some form of per line blocking), and carriers in all those jurisdictions, except for California, were already providing the service on an intrastate basis, California argued that the FCC should adopt an interstate Caller ID regime which respected regional and local differences. *Id.* It observed that its citizens were among the most privacy-conscious in the country, noting that the eleven metropolitan areas having the highest proportion of nonpublished numbers in the country were in California. A273, A278-A279. Indeed, in California's ten largest cities,

more than 60 per cent of telephone subscribers pay charges each month to have a private number that cannot be disclosed to the general public. *Id.*; A324-A332. Both in their brief and in their most recent reports to the CPUC, the telephone companies have confirmed that 50 per cent of California's 32 million citizens have nonpublished service. A337, A338-A341.

California also noted that in 1972 its citizens had, by a statewide ballot initiative, adopted the right of privacy as one of the "inalienable rights" of "all people" enumerated in the California Constitution. Cal. Const., Art. I, § 1, A197-A198, A343. In addition, California demonstrated that approximately 93 per cent of all telephone calls originating in California, and thus all calls subject to California's blocking regime, were intrastate calls, A254-A257, thereby underscoring the significance of the state's interest in establishing policies to protect its citizens.

On April 25 and 27, 1995, California responded to a number of Pacific Bell *ex parte* filings advocating FCC preemption of California's per line blocking default for nonpublished subscribers. A269-A301. California stated that "customer notice and education programs – even those as thorough and robust as the program required by the CPUC in its intrastate Caller ID decision – are unlikely to communicate information to more than 70% of a given population" and that "such programs cannot be an effective substitute for a default blocking option that will protect the privacy interests of customers who fail to receive actual notice." A283, *see also* A287-A292, A295, A299-A300, A302-A323, A336. California's statements and evidence were fully confirmed by Pacific Bell's own estimate filed with the CPUC and presented by the CPUC to the Ninth Circuit that even after completion of its

education program, from 35 to 50 per cent of its customers would be unaware of the transmission of telephone numbers for disclosure and from 60 to 75 per cent of its customers would be unaware of the ability to block disclosure. A336.

California explained that "[a] default really addresses *only* those customers who fail to receive actual notice, since all customers who do receive actual notice may be presumed to have made a choice." A283 (emphasis in original).[4] California went on:

> For these nonpublished subscribers who pay their local carrier each month for heightened privacy and fail to receive actual notice, a per call blocking default would be the same as ***no blocking option at all*** because these people – at least 2.1 million California families and likely more – will not have been informed that they must dial *67 each time they make a telephone call in order to preserve their privacy. The *only* way to protect the interests of these people is with the per line blocking [with *82 override] default established for intrastate Caller ID by California.

A283-A284 (emphasis in original).

On May 5, 1995, the FCC released its *Reconsideration Order*, A87-A175, which reaffirmed the *Report and Order*'s requirement that calling party numbers be transmitted to all interconnecting carriers for disclosure by the terminating carrier starting December 1, 1995, A96, A108, A135, but

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[4] It makes no difference what the default is if all customers are aware of disclosure and blocking, for the customer who allows the default of which she is aware to take effect has made a choice. Moreover, *informed* nonpublished customers who allow California's per line blocking default to take effect can cause their numbers to be disclosed by dialing *82 on each call and can even change to per call blocking free of charge, if they prefer. Nonpublished customers who are unaware of these options cannot.

reversed the *Report and Order*'s per-call-blocking-only regime, deferring to the blocking regimes of states that permitted per line blocking with *82 override, A133-A135. However, the FCC preempted California's per line blocking default for customers with nonpublished numbers. A135-A143. It ruled that "to accomplish per line blocking by default rather than by customer choice conflicts with our federal goals." A137, *see also* A137-A143. It also concluded that it was infeasible to have two different default rules – one for interstate calls and one for intrastate calls – and therefore concluded that its per call blocking would apply to all calls originating in California, even though some 93 per cent of those calls were intrastate. A136, A254-A257. In so ruling, the FCC refused to acknowledge California's comments and evidence, now conceded by Pacific Bell, that even with strong education efforts, millions of nonpublished subscribers will not learn of disclosure and blocking and hence, under the FCC's per call blocking default, will not be able to protect their privacy. A142-A143.

In the *Reconsideration Order*, the FCC also denied California's request for a stay of its preemption "pending court review." A143. On December 1, 1995, however, the FCC issued an order staying the transmission of calling party numbers on all calls originating in California until June 1, 1996, to allow more time for education efforts, but stating it would not entertain further stays. *Order and Fourth Notice of Proposed Rulemaking*, 10 FCC Rcd. 13796, ¶¶ 23, 25 (1995). On December 26, 1995, the Ninth Circuit denied California's request for a stay of the FCC's preemption order pending appeal as moot. *Order*, Ninth Cir. Nos. 94-70197, *et al.* (Dec. 26, 1995).

On January 31, 1996, the Ninth Circuit entered its judgment denying California's petition for review. A1-A32. Despite extensive discussion of these matters in the briefs and

pleadings and at oral argument, the Court's opinion made no mention of the CPUC's evidence and the carrier concessions that even after education programs are completed, millions of customers will be unaware of their ability to block the disclosure of their telephone numbers. It rejected California's preemption argument, concluding that the FCC had rationally found that its federal policies were negated by California's default rule. A15-A21. It rejected California's free speech arguments, concluding that the First Amendment precludes the compelled dissemination of an "ideological message" but not the compelled disclosure of personal information. A24-A26.[5] And it rejected California's federal constitutional privacy claim, concluding that the right of privacy only applies to a person's most basic decisions about family and parenthood, as well as bodily integrity, and not to personal information such as nonpublished telephone numbers. A23-A24.

This petition for a writ of certiorari follows.

REASONS FOR ALLOWANCE OF THE WRIT

Starting June 1, 1996, absent action by this Court, the home telephone numbers of millions of California citizens residing in households with nonpublished service will be transmitted for disclosure on every call they make without their knowledge or consent. While the FCC's preemption order may be a boon to telemarketers and those seeking to

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[5] The Ninth Circuit states that "the FCC's regulation does not compel disclosure of the identity of a person who exercises his or her freedom of expression." A26. However, in light of the facts that the FCC's orders *require* the transmission of calling party numbers for disclosure in the 47 states in which Caller ID service is presently deployed, that millions of customers will not be aware of the transmission of numbers and the ability to block, and that speakers on the telephone obviously engage in protected speech, California submits that the Ninth Circuit's statement is simply wrong.

develop and sell telemarketing lists to others, the desire to avoid such intrusions on the sanctity of the home is one of the primary reasons why fifty per cent of Californians pay charges every month for a nonpublished telephone number.

This is the only time the novel questions presented by this case will come before the Court. This is not a case in which the issues will ripen by consideration in lower courts nor is it one in which the Court may properly "allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari). Nor is this a case in which there is, *or even could be*, a conflict between the circuits or between a circuit and a state court of last resort.[6] California is the only state in the country to have adopted a per line blocking default for nonpublished customers, and, for better or worse, the other 47 states and the District of Columbia that have authorized the provision of Caller ID service have all long ago implemented their respective blocking regimes. The issues presented here are unlikely to arise in those states or in the circuits in which they are situated. Thus the Court is unlikely to see these issues again under any circumstances and certainly will not see them again focused by the urgency of imminent implementation violating the rights of millions of people with nonpublished service. This

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[6] While the Supreme Courts of California and Washington have found a legitimate expectation of privacy in nonpublished telephone numbers, they have enforced that expectation under their respective state constitutions. *People v. Chapman*, 36 Cal. 3d 98, 105, 679 P.2d 62, 201 Cal.Rptr. 628 (1987); *State v. Butterworth*, 48 Wash.App. 152, 737 P.2d 1297, review denied, 109 Wn.2d 1004 (1987); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

case must therefore be regarded as an exception to the conflict standard enumerated in U.S. Sup. Ct. R. 10(a).[7]

The Court should accordingly make its certiorari decision based on the importance of the interests involved, and here those interests are: (1) the important interest in preserving a state's authority under our federal system to protect the privacy and safety of its citizens, and (2) the important individual interests in freedom of speech and privacy.

Federalism

In this case the FCC ignored principles of federalism and swept aside with little or no analysis the considered judgment of the State of California, which established needed privacy protection for its citizens. Since California's default rule is designed to protect those nonpublished customer who are unaware of disclosure and blocking, the FCC could have narrowly tailored its preemption order to leave California's protection in place for *those* uninformed customers *only*. Instead, it trumped California's protection for millions of the state's citizens who are without the knowledge to protect themselves.

It did so in the face of this Court's clear acknowledgment that "the protection of a person's *general* right of privacy – his right to be let alone by other people – is, like the protection of his property and of his very life, left largely to the law of the individual States." *Katz v. United States*, 389 U.S. 347, 350-51 (1968) (footnotes omitted; emphasis in original). Indeed, the Ninth Circuit itself has recognized in a slightly different context that California's privacy regulation of telecommunications is permissible regulation "to protect the

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[7] Should the Court deny certiorari, the Ninth Circuit's decision will stand as a clear obstacle to other states adopting privacy protections such as California's in the future.

public health, safety and welfare." *Air Transport Ass'n v. Pub. Util. Comm'n of California*, 833 F.2d 200, 204 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988). Such regulation does "not substantially affect the conduct of an efficient, nationwide telecommunications network." *Id.* at 203, *citing Aeronautical Radio, Inc. v. Air Transport Ass'n*, 102 FCC 2d 1 (1985). "Congress has indicated to the states that they may legislate to protect the privacy of telephone conversations, and that nothing in the Federal Communications Act preempts state legislation in this area." *Air Transport Ass'n*, 833 F.2d at 206, *citing Aeronautical Radio*, 102 FCC 2d at 5, 6.

This case therefore bears a marked similarity to *United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), a case decided under the Commerce Clause, because California's adoption of a mechanism to protect the privacy and safety of its citizens does not "substantially affect" the FCC's regulation of interstate telecommunications "within the scope of its congressionally delegated authority" under the Communications Act. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Indeed, in this case California's privacy protection does not significantly intrude on federal regulation of interstate telecommunications because unrebutted evidence demonstrates that approximately *93 per cent* of the affected telephone calls are intrastate in nature. A254-A257. In other contexts, the FCC has ruled under its "jurisdictional separations" procedures, 47 U.S.C. § 410(c), that the federal interest in regulating service which involves less than ten per cent interstate traffic is *de minimis*. *Decision and Order*, 4 FCC Rcd 5660 (1989), at ¶ 2, *adopting Recommended Decision and Order*, 4 FCC Rcd 1352 (1989). These facts, taken with the clear jurisdictional limitations placed on the FCC by 47 U.S.C. § 152(b)(1), *see Louisiana, supra*, 476 U.S. at 369-374, strongly suggest that California's privacy regulation

should withstand preemption under the circumstances presented. *See also* A275-A276.

It is also significant that the FCC's preemption order abrogates California's state constitutional right of privacy on which the default rule rests, *see* Cal. Const., Art. I, § 1, A143 while never explaining why federal policy requires the compelled nonconsensual disclosure to the general public of private residential telephone numbers.

Of course the FCC concluded below that it is not reasonably possible to have different default rules for interstate and intrastate telecommunications service. The FCC's attempt to utilize the ever-expanding "impossibility exception" of *Louisiana, supra,* 476 U.S. at 375 n. 4, to justify its preemption order should be found unavailing where, as above noted, the federal interest is *de minimis.* The FCC's argument to the contrary – that California's sheer volume of calls, unlike that of other states, necessitates preemption of its default mechanism – is unpersuasive. A137-A138. The volume of interstate calls *pales* when compared with the volume of *intrastate* calls to which California's default is applicable. Moreover, if the FCC's claim were correct, California would be required to make its intrastate regulation mirror FCC regulation whenever the FCC chose simply because of California's size, while smaller states would be free to regulate intrastate service consistently with their view of the public interest. Such a conclusion would stand the dual jurisdictional scheme on its head. *See Louisiana, supra,* 476 U.S. at 368-376.

The issue is certainly not without difficulty. The *Louisiana* framework was established in the context of depreciation rates. The Court therefore had no occasion to address whether a federal interest in enriching telephone companies and telemarketers was negated by a state's effort to protect the privacy and safety of its citizens. Resolving the issue would

undoubtedly require the Court to consider whether, under our federal system, state regulation in the area of public health, safety and welfare materially intrudes on legitimate FCC regulation of interstate telecommunications. To vindicate common notions of federalism as well as the state's authority to protect its citizens, the Court should grant certiorari on this important question.

Freedom of Speech

The individual rights aspect of this case – implicating free speech and privacy values long recognized by the Court – is no less important. The First Amendment protects against the coerced disclosure of private information which the speaker chooses not to reveal, creating both a right not to speak and a right to speak anonymously. " 'The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.' " *Harper & Row Publishers v. Nation Enterprises,* 471 U.S. 524, 559 (1985) *quoting Estate of Hemingway v. Random House,* 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255 (1968) (emphasis in original).

Although this principle has often been applied to defeat the governmentally coerced dissemination of an "ideological message," *e.g., Wooley v. Maynard,* 430 U.S. 705, 714-717 (1977), and cases there cited, the Court has also found it applicable to the coerced disclosure of factual information. *E.g., Planned Parenthood v. Casey,* 505 U.S. 833, 884 (1992) (right not to speak implicated by statute requiring disclosure of medical information); *Riley v. National Federation of the Blind,* 487 U.S. 781, 795-798 (1988) (right not to speak violated by requirement that fundraiser disclose percentage of contributions actually turned over to charity).

The compelled disclosure of personal information relating to the identity of the speaker intrudes on the speaker's "individual freedom of mind." *Wooley, supra,* 430 U.S. at 714, *quoting West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), and *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). This Court has recognized that information regarding the identity of the speaker is "inextricably intertwined" with the speaker's substantive message, *Riley,* 487 U.S. at 796, and can impact the persuasiveness of the speaker's ideas, *McIntyre v. Ohio Elections Comm'n,* 514 U.S. ___, 115 S.Ct. 1511, 1517, 131 L.Ed.2d 426, 437 (1995). Here, the compelled nonconsensual disclosure of private telephone numbers identifying the speaker "burdens protected speech" and is subject to exacting First Amendment scrutiny. *Riley,* 487 U.S. at 798; *McIntyre,* 514 U.S. at ___, 115 S.Ct. at 1518-19, 131 L.Ed.2d at 439-441.

While the question here is concededly novel, the Court's decisions suggest that in the absence of a strong justification, the governmentally coerced disclosure of private information which the speaker chooses not to reveal is repugnant to the First Amendment. The Court should grant certiorari to settle this important question.

Privacy

The privacy aspect of this case is also undeniably important, for the interest involved is "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men," *Olmstead v. United States,* 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The Court's decisions suggest that that constitutional privacy values enforceable under the First, Fourth, Fifth and Ninth Amendments prohibit the government from coercing the involuntary disclosure of the nonpublished residential telephone numbers of California

citizens absent a significant, if not compelling, governmental justification.

In *Whalen v. Roe*, 429 U.S. 589, 599 (1977), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977), the Court recognized that its privacy cases have involved the protection of "the individual interest in avoiding disclosure of personal matters." It is true that both *Whalen* and *Nixon* found the privacy interest in avoiding disclosure of personal information adequately protected by statutory and regulatory "precautions . . . to prevent the unwarranted disclosure of private . . . information." *Nixon*, 433 U.S. at 458, *citing Whalen*. But here the FCC has obliterated the necessary "precaution" which California required.

The privacy interest in avoiding disclosure of personal matters was also recognized in *DOJ v. Reporters Committee*, 489 U.S. 749, 762-780 (1989). There the Court, citing *Whalen*, found the individual privacy interest in FBI rap sheets "substantial" and enforceable under the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, even where portions of the information were already part of the public record. And in *DOD v. FLRA*, 510 U.S. ___, 114 S.Ct. 1006, 1015, 127 L.Ed.2d 325, 337, 338 (1994), the Court, under the same statutes but citing *Rowan v. Post Office Dept.*, 397 U.S. 728, 737 (1970), for the proposition that constitutional privacy protection is accorded to the home, found a "far from insignificant" individual privacy interest in *home addresses*, even though "home addresses often are publicly available through sources such as *telephone directories*" (emphasis added). The Court said: "An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." 510 U.S. at ___, 114 S.Ct. at 1015, 127 L.Ed.2d at 337.

The Fourth Amendment cases similarly protect a citizen's legitimate expectation of privacy from governmental intrusion. *Katz v. United States, supra,* 389 U.S. at 351-352, and 361 (Harlan, J., concurring). A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as reasonable." *Katz,* 389 U.S. at 361 (Harlan, J., concurring). Under *Katz,* a citizen who pays the telephone company each month for a number which, under the applicable tariff, cannot be disclosed to the general public, has a legitimate expectation of privacy in that number enforceable under the Fourth Amendment.[8] Moreover, that expectation "cannot be wiped out 'by the simple and expedient device of its universal violation.' . . . Whatever role the subjective expectation of privacy may play in determining the extent of a constitutional right, ' . . . the [government] cannot curtail a person's right to privacy by announcing and carrying out a system of surveillance which diminishes that person's expectation.' " *People v. Chapman, supra* note 6, 36 Cal.3d at 113, *quoting Delancie v. Superior Court,* 31 Cal.3d 865, 875 n. 11, 876, 647 P.2d 830, 183 Cal.Rptr. 866 (1982). Finally, here the nonpublished customer's subjective expectation of privacy is not diminished by the FCC's issuance of its Caller ID rules because the customer California's default is intended to protect is unaware of those rules.

The privacy decisions relied on by the Ninth Circuit below are wholly inapposite. *Planned Parenthood v. Casey,*

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[8] In circumstances in which the FCC's preemption order has the effect of compelling the disclosure of a nonpublished number to a Caller ID subscriber without the knowledge and consent of the caller, there is both a "search" and a "seizure" of the nonpublished number within the meaning of the Fourth Amendment, *see Soldal v. Cook County,* 506 U.S. 56, 63 (1992), *quoting United States v. Jacobsen,* 466 U.S. 109, 113 (1984), as well as a violation of the privacy interests identified in *Katz,* 389 U.S. at 350 nn. 4-6.

supra, was a reproductive rights case, not an informational privacy case, and this Court has repeatedly distinguished the two. *Whalen, supra*, 429 U.S. at 598-99; *Nixon, supra*, 433 U.S. at 457; *Reporters Committee, supra*, 489 U.S. at 762.

Similarly, *Smith v. Maryland*, 442 U.S. 735 (1979) – the "pen register" case – has nothing whatsoever to do with the *compelled disclosure* of *nonpublished numbers* to *the general public*. *Smith* found it doubtful "that people in general entertain any actual expectation of privacy in the numbers they dial." *Id.* at 742. Here, however, we are not dealing with "people in general" but with nonpublished subscribers – people who pay the telephone company each month to assure that their private telephone numbers remain private. *Smith* also found that there was no reasonable expectation of privacy in the numbers dialed because "[a]ll telephone users realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* Here, however, the FCC has not required the disclosure of the calling party's number merely to the telephone company but to every call recipient the nonpublished subscriber has occasion to call. Finally, *Smith* held that "even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not 'one that society is prepared to recognize as reasonable' " because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-744. Here, however, the nonpublished subscriber who is not informed about disclosure and blocking is not *voluntarily* disclosing the number to third parties. The disclosure is without the subscriber's knowledge and consent, is contrary to the tariffed prohibition on disclosure, and is accomplished at the direction of the FCC. *See also Smith*, 442 U.S. at 746-48 (Stewart, J., dissenting), 748-752 (Marshall, J., dissenting). *Smith* is plainly inapposite.

At bottom line, the FCC has concluded that its federal policy of enhancing the development and profitability of Caller ID services, to the benefit of telephone companies and telemarketers alike, justifies the unknowing and nonconsensual disclosure of the private home telephone numbers of millions of citizens. This conclusion contravenes constitutional values consistently recognized by this Court. As we enter the "Information Age" of relentless telemarketing, of readily available databases containing universal directories, customer credit profiles and other current virtual biographies, with cross-referencing software, and of the unencumbered dissemination of information on the Internet, *see, e.g., Whalen, supra,* 429 U.S. at 605; *Reporters Committee, supra,* 489 U.S. at 769-71; *White v. Davis,* 13 Cal.3d 757, 773-76, 533 P.2d 222, 120 Cal.Rptr. 94 (1975), California's authority to adopt a mechanism to preserve its citizens' control over personal information such as their nonpublished telephone numbers should be protected by this Court.

CONCLUSION

California respectfully requests that the Court issue a writ of certiorari to review the judgment of the Ninth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
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OF THE

United States

October Term, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

VS.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME I (Pages A1-A175)

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CALIFORNIA V. FCC, 75 F.3D 1350 (9TH CIR. 1996)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE STATE OF CALIFORNIA; PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA; *Petitioners,* PENNSYLVANIA PUBLIC UTILITY COMMISSION ("PAPUC"); SOUTHERN CALIFORNIA COALITION ON BATTERED WOMEN; TOWARD UTILITY RATE NORMALIZATION ("TURN"); CONSUMER FEDERATION OF AMERICA; CONSUMER ACTION; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS ("NASW"); THE CALIFORNIA ALLIANCE AGAINST DOMESTIC VIOLENCE; THE FAMILY VIOLENCE PREVENTION FUND; *Petitioners-Intervenors,* v. FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA; *Respondents,* US WEST COMMUNICATIONS; MCI TELECOMMUNICATIONS CORPORATION; AD HOC TELECOMMUNICATIONS USERS COMMITTEE ("COMMITEE"); AT&T CORPORATION; THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS; NATIONAL ASSOCIATION OF CONSUMER ADVOCATES (NASUCA), AMERITECH OPERATING COMPANIES; SOUTHWESTERN	No. 94-70197 FCC No. 94-59 OPINION

BELL TELEPHONE COMPANY; PACIFIC BELL; UNITED STATES TELEPHONE ASSOCIATION (USTA); BELLSOUTH CORPORATION; *Respondents-Intervenors.* AND CONSOLIDATED CASES.	)	No. 95-70470 No. 95-70519 No. 95-70571

Petitions to Review Orders
of the Federal Communications Commission

Argued and Submitted
November 16, 1995 – San Francisco, California

Filed January 31, 1996

Before: Mary M. Schroeder and Arthur L. Alarcon, Circuit Judges, and Robert H. Whaley,* District Judge.

Opinion by Judge Alarcon

SUMMARY

Government Law/Communications

The court of appeals denied petitions for review of orders of the Federal Communications Commission (FCC). The court held that an FCC rule that subscribers who fail to choose the method to prevent disclosure of their nonpublished telephone numbers, when Caller ID service becomes effective, must be served with a "per call blocking" system, does not arbitrarily and capriciously preempt a Public Utilities Commission of the State of California (CPUC) rule that emergency service organizations and subscribers with nonpublished numbers who fail

* Honorable Robert H. Whaley, United States District Judge, for the Eastern District of Washington, sitting by designation.

to communicate their choice between per call blocking and "per line blocking" be served with a system that blocks disclosure on all calls. The court also held that the FCC's preemption order did not violate the federal constitution. Finally, the court further held that the FCC's "free passage rule," which requires telephone carriers using Common Channel Signalling System 7 (SS7) to deliver calling party numbers (CPN) without charge to other telephone carriers, is not arbitrary and capricious.

Provision of telephone services is divided between local exchange carriers (LECs) and long distance carriers (IXCs). Many IXCs have invested in SS7 by installing it in their own networks and by establishing SS7 interconnections with LECs to allow passage of CPN.

The FCC undertook efforts to promote the availability of interstate Caller ID, a service that permits a customer who receives a call to see the number of the person who placed the call unless the calling party blocks disclosure of the number. CPN is transmitted by means of SS7.

Petitioner the Public Utilities Commission of the State of California (CPUC) authorized California LECs to offer intrastate Caller ID service. The decision of the CPUC provides that each subscriber shall have a choice between "per call blocking" and "per line blocking" without cost. Per call blocking requires the customer to dial *67 each time a call is made to protect his or her privacy. Per line blocking is a system that blocks disclosure on all calls unless the calling party dials *82. The CPUC determined that emergency service organizations and subscribers who pay monthly charges for nonpublished telephone numbers, and who do not communicate their choice, will receive per line blocking service.

Other subscribers who do not make a choice will receive per call blocking service.

The FCC recognized that some IXCs were building the SS7 facilities needed to transmit CPN and other services on interstate calls. The FCC determined that it would be in the public interest to adopt rules to encourage and regulate the development of SS7 services. The FCC released a First Report and Order (First R&O), in which the FCC concluded that interstate passage of CPN could bring a variety of benefits to consumers and promote technological innovation that would foster economic efficiency. The FCC determined that inconsistent state regulatory schemes for CPN blocking options and uncertainty regarding compensation for the interstate transmission of CPN created investor uncertainty and customer confusion about CPN. The FCC determined that making per call blocking available on all interstate calls best accommodates the interests of calling and called parties. The First R&O provided for preemption of state regulation of Caller ID that prohibited per call blocking for interstate calls. The FCC also proposed adoption of a rule requiring carriers to transport CPN to other carriers free of charge; the agency found that the transmission of CPN imposed only *de minimis* additional costs on IXCs who had already invested in SS7.

The CPUC, AT&T Corp., and Competitive Telecommunications Association (CompTel) filed separate petitions for reconsideration of the First R&O. The FCC issued a reconsideration order (Second R&O). The FCC narrowed its preemption of state public utilities blocking regulations by permitting subscribers to choose per line blocking or per call blocking on interstate calls, provided that all carriers were required to adopt a uniform method for overriding blocking on any particular call. The FCC also preempted the CPUC's

regulation that nonpublished subscribers and emergency service organizations that do not make a selection would be assigned per line blocking. The FCC stated that California's default policy thwarted and impeded federal goals for interstate CPN-based services. The FCC also concluded that carriers should not be permitted to charge other carriers for transmission of CPN.

The CPUC filed two petitions seeking review of the FCC's decision denying reconsideration of the FCC's rule that subscribers who fail to choose the method to prevent disclosure of their nonpublished telephone numbers, when Caller ID service becomes effective, must be served with per call blocking to protect their privacy. The CPUC argued that the rule violates federal constitutional rights, and arbitrarily and capriciously preempts the CPUC rule that emergency service organizations and subscribers with nonpublished numbers who fail to communicate their choice between per call blocking and per line blocking be served with a system that blocks disclosure on all calls. AT&T and CompTel filed separate petitions, seeking review of the denial of their petitions for reconsideration of the FCC's decision requiring telephone carriers using SS7 to deliver CPN without charge to other telephone carriers (the free passage rule).

[1] The fact that the FCC narrowed its preemption in the Second R&O did not prevent it from preempting CPUC's blocking default plan. **[2]** The FCC's explanation that the CPUC's per line blocking default rule would impeded development of CPN-based services was rational. **[3]** Although the Communications Act of 1934 separates the regulation of interstate and intrastate telecommunications and denies to the FCC any authority over intrastate communications, **[4]** a

Supreme Court decision recognized an "impossibility" exception to the limitation on the FCC's authority. [5] The FCC set forth its justification for preempting the CPUC's per line blocking default for intrastate calls in the Second R&O. [6] The FCC's preemption order met the requirement that a preemption rule should be narrowly tailored to fit federal policies. The FCC preemption regulation was not arbitrary and capricious, and preemption of CPUC's default fit within the "impossibility exception."

[7] In regard to CPUC's federal constitutional challenges to the FCC's Caller ID rule, a phone number is not among the select privacy interests protected by a federal constitutional right to privacy. [8] The preemption rule did not violate any cognizable privacy interest. [9] In addition, exposure of a telephone number does not violate the First Amendment right not to speak, [10] and the FCC's preemption order did not violate the First Amendment right to speak anonymously.

[11] The FCC's free passage rule was not arbitrary and capricious. [12] And, because the FCC did not impermissibly engage in rate making without following the required procedures, AT&T and CompTel's argument that the FCC violated Communications Act § 205 was rejected.

COUNSEL

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OPINION

ALARCON, Circuit Judge:

California's Public Utilities Commission ("CPUC") has filed two petitions seeking review of the Federal Communications Commission's ("FCC") decision denying reconsideration of the FCC's rule that subscribers who fail to choose the method to prevent disclosure of their nonpublished[1] telephone numbers, when Caller ID service becomes effective, must be served with a system that requires the customer to dial *67 each time a call is made ("per call blocking") to protect his or

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[1] Nonpublished refers to both unlisted telephone numbers (which are available from directory assistance) and unpublished telephone numbers (which are both unlisted and not available from directory assistance).

her privacy. CPUC argues that this rule violates federal constitutional rights, and arbitrarily and capriciously preempts the CPUC rule that emergency service organizations and subscribers with nonpublished numbers, who fail to communicate their choice ("default")[2] between per call blocking and a system that blocks disclosure on all calls unless the calling party dials *82 ("per line blocking"), be served with a system that blocks disclosure on all calls.

AT&T Corporation ("AT&T") and Competitive Telecommunications Association ("CompTel") have filed separate petitions in which they seek review of the denial of their petitions for reconsideration of the FCC's decision requiring telephone carriers using Common Channel Signalling System 7 ("SS7")[3]. to deliver calling party numbers ("CPN") without charge (the "free passage" rule) to other telephone carriers.

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[2] Default is a term of art used by the parties in this case to refer to the assignment of a blocking system to a subscriber who does not respond to a request that a choice be made between per line blocking and per call blocking.

[3] Common Channel Signalling System 7 refers to a technological advancement in the method that telephone calls are set up (*i.e.*, how a connection is established). Prior to the development of SS7 signalling systems, calls were set up over the communications channels that also carried the conversations once connections were completed. This is referred to as "in-band signalling," in that the call set up and related signalling were performed in the same frequency bands as the ultimate calls and were an expensive prelude to those calls. The SS7 system permits "out of band" signalling to occur, *i.e.*, it allows calls to be set up over a separate set of systems and switches that do not tie up communications channels. SS7 permits telephone companies to carry and transmit CPN, and to offer a host of other new services that include: pay-per-view television, order entry verification, voice message storage, secure computer access, customized customer service, business fraud reduction, call routing, and emergency dispatch.

AT&T and CompTel filed their petitions in the District of Columbia Circuit. The petitions for review filed by CPUC, AT&T, and CompTel were consolidated by the Judicial Panel on Multidistrict Litigation.[4]

We conclude that the FCC did not act arbitrarily and capriciously in ruling (1) that the preemption of the CPUC's rule was necessary to prevent negation of a valid FCC regulatory goal, and (2) that the imposition of the per call blocking option on subscribers with nonpublished numbers and emergency service organizations, who do not make a choice between Caller ID blocking systems, does not violate any federal constitutional right. We uphold the FCC's free passage rule because the record shows that the FCC examined the relevant evidence and adequately explained all aspects of its decision.

We have divided the opinion into two parts. In Part One, we review CPUC's challenge to the FCC's preemption of the

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[4] Pacific Bell and GTE California have intervened and submitted a brief in support of the FCC responding to CPUC's petition. Toward Utility Rate Normalization ("TURN"), Consumer Action ("CA"), Consumer Federation of America ("CFA"), Southern California Coalition on Battered Women ("SCCBW"), the National Association of Regulatory Utility Commissioners ("NARUC"), the National Association of Social Workers ("NASW"), Pennsylvania Public Utility Commission ("PPUC"), and California Alliance Against Domestic Violence & the Family Violence Prevention Fund ("CAADC") have intervened and submitted a joint brief in support of CPUC. Ameritech Operating Companies, Bell Atlantic Telephone Companies, BellSouth Telecommunications, Inc., GTE Service Corporation, National Telephone Cooperative Association, Southwestern Bell Telephone Company, United States Telephone Association, and U S West Communications, Inc. (collectively "Network Intervenors") have intervened and submitted a brief in support of the FCC and in response to AT&T's and CompTel's petition.

type of Caller ID blocking service that must be offered to emergency service organizations and subscribers with non-published telephone numbers who do not make an election. In Part Two, we consider the claims of AT&T and CompTel that the free passage rule violates the requirements of the Administrative Procedures Act ("APA"), and is arbitrary and capricious. To set the stage for our discussion of these discrete questions, we will summarize the historical facts and procedural steps that preceded this current legal contest.

The provision of telephone services is divided between local exchange carriers ("LECs") and long distance carriers ("IXCs"). LECs generally provide all telephone services within their authorized local calling areas, and the vast majority of intrastate toll calls. The local carriers also provide access to IXCs. Virtually every long distance call originates with one LEC and terminates with another LEC. The IXCs run lines between local calling areas. They pay access fees to LECs to originate and to terminate long distance calls. IXCs earn revenue only when the called party accepts a long distance call. IXCs pay the LECs access fees for each long distance call, however, whether or not it is completed.

With the exception of toll free calls to 800 and 900 numbers, the calling party selects its long distance carrier. In contrast to LECs, however, an IXC does not have a business relationship with residential or commercial customers who *receive* long distance calls.

Like the LECs, AT&T and many other IXCs have invested in SS7, both by installing it in their own networks, and by establishing SS7 interconnections with LECs to allow

the passage of CPN. AT&T reported that its capital investment in SS7 exceeds one billion dollars. Other IXCs, such as CompTel, have not yet installed SS7 systems.

The consolidated cases before this court involve challenges to the FCC's efforts to promote the availability of interstate Caller ID.[5] Caller ID is a service that permits a customer who receives a call to see the number of the person who placed the call unless the calling party blocks disclosure of the number.[6]

CPN is transmitted by means of SS7, a relatively new technology. Caller ID service is presently available only on local calls carried by LECs over their SS7 systems. Today, LECs in 47 states and the District of Columbia offer some form of Caller ID for intrastate calls. On June 17, 1992, the CPUC authorized California LECs to offer intrastate Caller ID service. The CPUC decision provides that each subscriber shall have a choice between per call and per line blocking without cost. The CPUC's ruling requires telephone companies to conduct a vigorous notice and education program regarding Caller ID and the available blocking options to protect a subscriber's privacy.[7] The CPUC also determined that emergency service organizations and subscribers who pay

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[5] Under the Communications Act of 1934, state utilities, such as the CPUC, have authority over intrastate common carrier communications by wire or radio. The FCC has authority over interstate common carrier communications by wire or radio. 47 U.S.C. §§ 152(a) & 152(b).

[6] The calling party's number appears on a device that is attached to, or incorporated into, the called party's telephone.

[7] The customer notice and education program will include: the establishment of a 24-hour toll free number for consumer information, a consumer education campaign, and ordering inserts to accompany telephone bills.

monthly charges for nonpublished telephone numbers and do not communicate their choice, will receive per line blocking service. All other subscribers who do not make a choice will receive per call blocking service.

Although the CPUC authorized the introduction of Caller ID for intrastate calls in 1992, LECs in California, including Pacific Bell and GTE California, have not yet offered intrastate Caller ID service. Instead, they petitioned the CPUC for reconsideration of its blocking default rule. They argued that the CPUC should order LECs to provide per call blocking for all subscribers who do not communicate their choice.

In 1991, the FCC recognized that some IXCs were building the SS7 facilities needed to transmit CPN and other services on interstate calls. The FCC concluded that it would be in the public interest to adopt rules to encourage and to regulate the development of SS7 services. The FCC initiated the rulemaking process that led to the order currently under review on September 26, 1991.[8] The FCC's Notice of Proposed Rulemaking ("NPRM") solicited comments on a tentative federal regulatory model for interstate CPN services. The FCC's proposed goals for this model included promoting the availability and development of new consumer services, balancing the relevant privacy interests of the calling party and the called party,[9] and ensuring end-to-end passage of the CPN by IXCs participating in interstate calls. Over 100 comments were received by the FCC.

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[8] *Rules and Policies Regarding Calling Number Identification – Caller ID*, Notice of Proposed Rulemaking, 6 FCC Rcd 6752 (1991).

[9] Calling party refers to the person initiating a call. Called party refers to the person receiving the call.

Following the comment period, the FCC released its First Report and Order ("First R&O") on March 6, 1994. In the First R&O, the FCC concluded that interstate passage of CPN could bring a variety of benefits to consumers and promote technological innovation that would foster economic efficiency. The FCC determined that two issues created investor uncertainty and customer confusion about CPN: (1) inconsistent state regulatory schemes for CPN blocking options;[10] and (2) uncertainty regarding compensation for the interstate transmission of CPN.

The FCC found that the offering of Caller ID services did not violate the privacy of the calling party. The FCC determined that making per call blocking available on all interstate calls best accommodated the interests of the calling party and the called party. On that basis, the First R&O provided for the preemption of state regulation of Caller ID that prohibited per call blocking for interstate calls. The FCC also rejected per line blocking as an undue burden on the called party.

In its First R&O, the FCC also proposed the adoption of a rule requiring carriers to transport CPN to other carriers free of charge. The FCC reasoned that the unimpeded flow of the calling party's number throughout the network ensured to subscribers the broadest choices. The FCC also found that free passage of CPN eliminated costs, that would have

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[10] Blocking options refer to the methods available to a calling party to prevent the disclosure of his or her telephone number. When a telephone number is blocked, the transmission of the telephone call is accompanied by a privacy indicator that prevents the disclosure of the calling party's number to the called party. The same SS7 protocol, and the same facilities are used to pass CPN to the called party, whether the call is interstate or intrastate. Thus, default per line blocking would affect both intrastate and interstate calls.

occurred in negotiations regarding cost allocation between the carriers, that could delay or impede development of CPN. Finally, the FCC found that the transmission of CPN imposed only *de minimis* additional costs on IXCs who had already invested in SS7.

CPUC, AT&T and CompTel filed separate petitions for reconsideration of the First R&O. The FCC stayed the rule's effective date pending reconsideration of its proposed rules.

On May 5, 1995, the FCC issued a reconsideration order ("Second R&O"). The FCC narrowed its preemption of state public utilities blocking regulations by permitting subscribers to choose per line blocking or per call blocking on interstate calls, provided that all carriers were required to adopt a uniform method of overriding blocking on any particular call. The FCC determined that a dual blocking scheme for interstate and intrastate calls was infeasible.[11] The FCC also preempted the CPUC's regulation that nonpublished subscribers and emergency service organizations that do not make a selection would be assigned per line blocking.

In the Second R&O, the FCC adhered to its finding that the incremental cost of transmitting CPN for long distance carriers who have already installed the SS7 system was *de minimis* or "essentially zero." Accordingly, the FCC concluded that carriers should not be permitted to charge other carriers for the transmission of CPN. The FCC noted that the IXCs were already recovering their costs for the SS7 upgrade through charges to their long distance customers. The FCC

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[11] In its opening brief, CPUC did not challenge the FCC's finding that it was infeasible to offer separate blocking schemes for interstate and intrastate calls, therefore we need not discuss this factor.

concluded that the introduction of SS7 systems by IXCs constituted a general network upgrade with costs that should be borne by the system's general users.

PART ONE

THE PREEMPTION ORDER

I. *The FCC's Preemption Order Is Not Arbitrary And Capricious*

The CPUC challenges as arbitrary and capricious the FCC's order preempting the CPUC's rule that nonpublished subscribers, who fail to express their choice of a system to prevent disclosure of their telephone number to a called party, must receive per line blocking service. The CPUC argues that the FCC's preemption order is invalid because it has failed to demonstrate that CPUC's rule negates a valid FCC goal.

We review a federal agency's action to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. . . . " 18 U.S.C. § 706(2)(A). We must also decide whether the agency's decision was "contrary to constitutional right, power, privilege or immunity. . . . " 5 U.S.C. § 706(2)(B). In carrying out our responsibility, we must determine whether the agency's decision was "a reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record." *California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990) ("California I"). The Supreme Court has instructed that although "this record inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v.*

Volpe, 401 U.S. 402, 416 (1971). An agency acts arbitrarily and capriciously if it "entirely failed to consider an important aspect of the problem" or "offered an explanation that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43-44 (1983). A reviewing court may overturn agency rulemaking decisions only where a "clear error of judgment" has occurred. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974).

CPUC argues that the FCC's preemption decision " 'fail[s] to consider an important aspect of the problem' " and "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43-44 (citation omitted). CPUC asserts that preemption of its per line blocking default rule, while allowing states to offer per line blocking for subscribers who request it, is irrational. CPUC maintains that having permitted the states to determine which blocking system will be available to its citizens, the FCC has no legitimate interest in dictating the blocking system a state assigns to nonpublished subscribers and emergency service organizations that do not communicate their choice.

[1] The FCC responds that the fact that it narrowed its preemption in the Second R&O, to accommodate both per line and per call state blocking systems, does not prevent it from preempting CPUC's blocking default plan. We agree. We have previously held that the FCC does not relinquish its preemption power simply because it has decided to exercise it narrowly, and to defer to the states in some area of common interest. *California v. FCC*, 39 F.3d 919, 931-933 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995) ("California III").

[2] The FCC's explanation of its decision that the CPUC's per line blocking default rule would impede the development of CPN based services is rational. The FCC is empowered "to make reasonable assumptions about economic impact based on the evidence currently available." *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1056 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977). The FCC can, in determining what regulations will best support the development of CPN for interstate calls, make a "predictive judgment" that its regulations will better serve that goal than would CPUC's default plan. *American Postal Workers Union v. United States Postal Service*, 891 F.2d 304, 314 (D.C. Cir. 1989) (noting that "agencies are entitled to engage in predictive judgments of the future public interest and that 'complete factual support' is not required where such predictions 'necessarily involve[ ] deductions based on the expert knowledge of the agency' ") (citation omitted), *rev'd on other grounds*, 498 U.S. 517 (1991). *See also Bowman Transp., Inc.*, 419 U.S. at 293-294 (stating "[i]f the Commission has 'drawn out and crystallized these competing interests [and] attempted to judge them with as much delicacy as the prospective nature of the inquiry permits,' . . . we can require no more.").

The Communications Act of 1934, 47 U.S.C. §§ 151-613, separates the regulation of interstate and intrastate telecommunications. Congress determined that the FCC should "make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges. . . . " 47 U.S.C. § 151. The FCC is also charged with the mission of encouraging "the provision of new technologies and services to the public." 47 U.S.C. § 157. The Act expressly denies to the FCC any authority

over intrastate communications. Section 2(b)(1) provides in pertinent part:

> [N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, . . .

47 U.S.C. § 152(b)(1).

The Supreme Court's decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375, n. 4 (1986), recognized an "impossibility" exception to the limitation on the FCC's authority set forth in section 2(b)(1). The Court held that the FCC may preempt a state regulation where it is "not possible to separate the interstate and intrastate components of the asserted FCC regulation." *Id.* The FCC may regulate "when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication." *California* I, 905 F.2d at 1243. We have concluded, however, that the impossibility exception is narrow. *Id.*

> The FCC must demonstrate that the state regulation would negate valid FCC regulatory goals. *Id.* [T]he FCC bears the burden of justifying its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals. (emphasis in the original).

California I, 905 F.2d at 1243.

In its First R&O, the FCC stated that its goal in promoting CPN based services was to develop and make available

new consumer services and choices. The most striking example of the benefits of a CPN service is that battered women or abused children have been rescued when they were unable to complete their plea for help or give their address because the emergency service dispatcher had received the calling party's number.

The FCC set forth its justification for preempting the CPUC's per line blocking default for intrastate calls in the Second R&O:

> 86. California's default policy thwarts and impedes our federal goals for interstate CPN-based services. Initially, to the extent California's default policy prevents the deployment of calling party number identification services in California, it deprives the residents of, and callers to, that state of access to the benefits we have determined in this proceeding are associated with such interstate services. It does this in a number of ways. First, unless carriers in California enable the lines of residents in that state to receive interstate CPN, these residents will be unable to realize the efficiencies and new service opportunities we believe will flow from interstate CPN-based services. Second, callers to California from other states also would be denied the benefits of these new services and opportunities when they made calls to businesses or residents in California. For example, callers to businesses would be subject to longer order processing times, longer credit verification processes, and more cumbersome call routing techniques. Similarly, absent number identification services, callers to residents are likely to have fewer completed calls than if they are calling residents who are able to recognize the calling party's number, and want to receive the call. The negative impact on interstate CPN policies is

exacerbated because residents in California receive and transmit more interstate calling minutes than the residents of any other state. Depriving parties participating in those calls from the benefits we anticipate of the deployment of interstate CPN-based services necessarily thwarts and impedes the accomplishment of our objectives, particularly the development of interstate CPN-based services.

87. California's policy also deprives both parties on an interstate call from California of choice, an important element in our balancing of the rights and expectations of the calling and called parties. First of all, we have determined that as a matter of federal policy, the called party should have access to incoming CPN unless the calling party has exercised his right not to have his CPN revealed. While we have carefully balanced the privacy interests of the calling party with the expectation of the called party to receive CPN, California's default policy upsets this balance on an interstate call. California provides no evidence that a caller who chooses to have an unlisted or nonpublished number also wants per line blocking. It is not apparent that a customer with an unlisted number, readily available through directory assistance, would object to the passage of that same number to a called party of his choosing when he makes a telephone call. Indeed, while it appears that more than forty states offer some level of per line blocking, no other state automatically assumes callers with unlisted or nonpublished numbers want per line blocking. The record indicates that the general availability of per line blocking adversely affects the penetration of CPN-based services. Because we seek to make interstate CPN-based services widely available, we are reluctant to conclude, absent any supportive evidence, that California's assumption is correct.

As demonstrated by the above findings, the FCC's preemption rule is a "reasonable exercise of its discretion, based on consideration of relevant factors, and supported by the record." *California* I, 905 F.2d at 1217.

[6] In the First R&O, the FCC established per call blocking as the national requirement for interstate calls and preempted any state that permitted per line blocking. The FCC also preempted states that authorized disclosure of the CPN with no blocking option at all. In its Second R&O, the FCC substantially narrowed the scope of its preemption order. It authorized per line blocking in states already providing that system. The FCC's preemption order precludes per line blocking default only for nonpublished subscribers and emergency service organizations that do not communicate their choice. The FCC's preemption order satisfies the requirement that a preemption rule should be narrowly tailored to fit federal policies. *California* III, 39 F.3d at 932. We hold that the FCC's preemption regulation is not arbitrary and capricious. We also conclude that the FCC's preemption of CPUC's default fits within the "impossibility exception" to section 2(b)(1) of the Communications Act.

II. *The FCC's Preemption Order Does Not Violate The Federal Constitution*

CPUC raises two federal constitutional challenges to the FCC's Caller ID rule. The FCC asserts that the CPUC lacks standing to present a constitutional challenge. The FCC also maintains that its preemption order does not invoke state action. We review constitutional questions *de novo*. *United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1995).

A. *CPUC Has Standing To Challenge The FCC's Preemption Order*

In appealing from an FCC preemption order, a state acts not merely as *parens patriae*, but also to vindicate its own sovereign interest in law enforcement and its subsidiary interest in creating and enforcing fair and effective public utility regulation. *Snapp v. Puerto Rico*, 458 U.S. 592, 601-602 (1987); *Pacific Gas & Elec. Co. v. Energy Resources Comm'n of California*, 461 U.S. 190, 205 (1983). The CPUC has standing to challenge the FCC's preemption order because of its interest in regulating intrastate telecommunications services consistent with federal constitutional protections and in exercising California's sovereign powers over matters reserved to the states.

B. *The CPUC's Exercise Of Its Authority Is State Action*

The FCC relies on two cases for the remarkable proposition that the CPUC is not a state actor. *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988). Neither case supports this theory. In Information Providers' Coalition, the court held that because "carriers are private companies, not state actors," there was no constitutional restraint on the termination of telephone service to "dial-a-porn operators." *Id.* at 877. In *Carlin Communications, Inc.*, the court concluded that a private telephone company was liable as a state actor under 42 U.S.C. § 1983 because a state prosecutor had directed it to prohibit transmission of the plaintiff's "adult entertainment." *Id.* at 1295, 1297. In this

matter, the CPUC, a state agency, contends that the preemption of its per line blocking default rule has violated the federal constitution. The FCC's argument that the CPUC's exercise of its rulemaking authority is not state action is clearly frivolous.

C. *The FCC's Preemption Of The CPUC Does Not Implicate Constitutional Privacy Rights*

[7] CPUC argues that the FCC's preemption of the CPUC's per line blocking default "violates the federal constitutional privacy rights of California citizens." (CPUC Brief at p. 29). CPUC has not cited any authority to support the notion that a telephone number is protected by the federal constitution. The Supreme Court has noted that "exposure of the self to others in varying degrees is a concomitant of life in a civilized society." *Time Inc. v. Hill*, 385 U.S. 374 (1967). Not every "exposure" raises privacy concerns under the United States Constitution. The Supreme Court has limited the constitutional right to privacy to interferences with "a person's most basic decisions about family and parenthood . . . as well as bodily integrity." *Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2806 (1992). A phone number is not among the select privacy interests protected by a federal constitutional right to privacy.[12] In *Smith v. Maryland*, 442

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[12] *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (upholding married couple's right to use contraceptives); *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (invoking the "sanctity of the family" and striking down, on privacy grounds, ordinance limiting right of certain relatives to occupy the same dwelling); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down law prohibiting persons of different races from marrying); *Skinner v. Oklahoma*, 316 U.S. 535, 543 (1942) (striking down law requiring sterilization of certain felons).

U.S. 735 (1979), the United States Supreme Court held that there is no Fourth Amendment right to prevent the disclosure of the telephone numbers dialed from a home telephone. The Court explained:

> Telephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes.

442 U.S. at 743 (Fourth Amendment protections do not extend to the installation and use of a pen register to record numbers dialed from a telephone).

[8] Relying on *Smith*, the highest courts in Ohio and South Carolina have ruled that there is no federal privacy right to protection from disclosure of telephone numbers via Caller ID services. *Ohio Domestic Violence Network v. Public Utilities Commission of Ohio*, 70 Ohio St. 3d 311, 318, 638 N.E.2d 1012, 1019 (Ohio S. Ct. 1994); *Southern Bell Telephone and Telegraph Co. v. Hamm*, 306 S.C. 70, 77-78, 409 S.E.2d 775 (1991). In *Saldana v. Wyoming*, 846 P.2d 604 (1993), the Wyoming Supreme Court held that there is no federal constitutional right to privacy that proscribes the disclosure of a nonpublished telephone number. *Id.* at 611. We conclude that the preemption rule does not violate any cognizable privacy interest.

D. *The FCC's Preemption Of The CPUC Does Not Violate The First Amendment*

[9] CPUC argues that the FCC's preemption of CPUC's per line blocking default violates the First Amendment right

of subscribers to remain anonymous and silent. Each of the First Amendment cases relied on by CPUC protects core political or religious speech.[13] The First Amendment protects persons from being compelled to express "adherence to an ideological point of view he finds unacceptable." *Wooley v. Maynard,* 430 U.S. 705, 714-715 (1977). The government cannot require an individual to participate in the dissemination on an "ideological message." *Id.* Exposure of a telephone number does not violate the First Amendment right not to speak.

[10] The argument that the Commission's preemption order violates a First Amendment right to speak anonymously is similarly devoid of merit. The CPUC's reliance on cases involving the right of anonymous political speech that have required disclosure of identity under threat of criminal and civil penalties is equally misplaced. In *McIntyre v. Ohio Elections Comm'n,* ___ U.S. ___, 115 S. Ct. 1511 (1995), the Court struck down a statute which prohibited the distribution of campaign literature. *Id.* at 1524. In *Talley v. California,* 362 U.S. 60 (1960), the Court declared unconstitutional a statute making it a crime to distribute anonymous handbills. *Id.* at 64-65. The Court instructed in *Talley* that "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* Similarly, in the third case relied on by CPUC, the California Supreme Court struck down a regulation requiring phone messages to include the name and address of the speaker because it "had the effect of restricting

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[13] The CPUC relies on *Wooley v. Maynard,* 430 U.S. 705, 714 (1977); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 258 (1974); *West Virginia Board of Education v. Barnette* 319 U.S. 624, 633-634 (1943).

the dissemination of ideas." *Huntley v. California PUC*, 69 Cal.2d 67, 72 (1968). Unlike the circumstances in the cited cases, the FCC's regulation does not compel disclosure of the identity of a person who exercises his or her freedom of expression. The FCC's preemption order does not violate the First Amendment right to speak anonymously.

PART TWO

THE "FREE PASSAGE" RULE

I. *The FCC's Free Passage Rule Is Not Arbitrary And Capricious*

AT&T and CompTel contend that the FCC's free passage rule is arbitrary, capricious and violates the APA. They argue that the FCC did not address highly relevant factors in determining whether to adopt a free passage rule. AT&T and CompTel claim that the FCC justified its free passage rule on the ground that it would not impose any costs or losses on IXCs. They assert that the FCC reached this conclusion by relying "solely on the fact that the IXCs' marginal costs of transporting Caller ID over previously constructed SS7 networks were *de minimis*." (AT&T and CompTel Opening Brief at p. 23). AT&T and CompTel assert further that the FCC ignored unrebutted evidence of potentially massive additional costs. Specifically, AT&T and CompTel assert that the FCC failed to consider the cost of the calls that will go unanswered with Caller ID. The record does not support this contention.

The record reveals that the FCC considered the potential loss of revenues that will result from unanswered calls. In finding that the IXCs would not necessarily lose revenues from unanswered calls resulting from the introduction of

Caller ID, the FCC relied on evidence in the record that supports an inference that CPN transmission will increase, rather than decrease, the number of calls answered. The FCC offers in its brief the example, based on comments in the record, that a called party might recognize a long distance number as a friend's and answer a call that might otherwise have gone unanswered. The FCC found evidence in the record that the IXCs would be compensated for any *de minimis* costs of CPN transmission by the revenue generated by other CPN based services. For example, the record shows that the 800 and 900 number services, for which AT&T bills the called party directly, represent a substantial portion of the long distance market. The FCC received evidence that in a typical day, more than 40 percent of the 160 million calls on the AT&T network are 800 number calls.

AT&T and CompTel next assert that there is no rational connection between the facts the FCC found and its stated policy objective of fostering investment in CPN based services. They claim that the FCC found that Caller ID services were beneficial to telephone customers and would enhance the value of the local Caller ID services. AT&T and CompTel assert that the free passage rule will not encourage IXC investment in SS7 systems.

The FCC concluded that IXCs will benefit from the free passage rule because IXCs with SS7 will continue to receive CPN from LECs without additional charge to the access fees the IXCs already pay LECs. This permits IXCs to develop and market their own interstate CPN based services, such as: customized customer service (which permits a special telephone ring for selected incoming calls), voice message storage, call routing, personal communication services, and advanced intelligence network. The FCC found further that

IXCs have the incentive to develop and deploy the SS7 system, irrespective of the revenues derived from CPN based services, because SS7 provides: greater network efficiencies due to quicker call set up, enhanced flexibility in call processing, and reduction in billing fraud. Contrary to AT&T and CompTel's contentions, the FCC articulated a rational connection between the facts found and its stated policy objective of fostering investment in CPN based services.

AT&T and CompTel next assert that the free passage rule is internally inconsistent because it bars IXCs from imposing charges to realize the value of their investment in SS7 upgrades, while it "allows LECs to earn additional revenues from the inclusion of interstate calls in the LECs' intrastate residential Caller ID offerings." (AT&T and CompTel Brief at p. 26). They argue such inconsistency is a "hallmark of arbitrary decisionmaking." *Id.* According to AT&T and CompTel, the impact of the FCC's free passage rule was to deprive them of the ability to recover for their investment in SS7 upgrades. AT&T and CompTel contend further that the FCC's determination, that the IXC investment in the SS7 system constitutes a "general network upgrade" with costs that must be recouped in general charges to be paid by all users and not in rates targeted to recipients, is contrary to prior FCC decisions. We disagree.

The FCC's free passage rule is consistent with its prior rulings that the investment in SS7 systems constitutes a general network upgrade with costs that must be recovered in general charges paid by all users. *See Provision of Access for 800 Service*, 6 FCC Rcd 5421, 5428 (1991) ("SS7 represents a general network upgrade, the core costs of which should be borne by all network users").

AT&T and CompTel's contention that the Second R&O permits LECs to charge its local customers for interstate Caller ID services while it bars IXCs from imposing charges on its subscribers finds no support in the record. The FCC's free passage rule does not bar IXCs from recovering their investment in SS7 from their general tariffs, greater network efficiencies, and the additional revenue IXCs can earn from marketing other CPN based services to 800 and 900 number customers. The FCC found, moreover, that it was impractical, because of the lack of relationship between IXCs and called parties, to permit the IXCs to recover fees from residential customers serviced with Caller ID. AT&T conceded in oral argument that it would have developed its SS7 system whether or not it was permitted to charge for interstate Caller ID.

Finally, AT&T and CompTel contend that the free passage rule is invalid because the FCC made no attempt to explain its departure from longstanding policies. AT&T and CompTel point to a decade of FCC decisions recognizing that telecommunications services may be priced to exceed their marginal or incremental costs – and must in aggregate recover the fully distributed or average costs. Thus, AT&T and CompTel assert that the FCC's focus on incremental rather than aggregate costs in this matter reflects a change in policy.

The FCC's free passage rule is not a departure from prior FCC decisions or policies. The FCC found that the cost of transporting CPN over completed SS7 systems was *de minimis* and that the IXCs were already recovering their investment in SS7. AT&T and CompTel have not demonstrated that there is an FCC policy permitting telecommunications companies to charge separately for a transmission whose costs are zero or *de minimis*.

[11] We conclude that the FCC's free passage rule is not arbitrary and capricious and does not violate the requirements of section 10(e) of the APA. 5 U.S.C. § 706.

II. *The FCC's Free Passage Rule Does Not Violate The Communications Act*

AT&T and CompTel assert further that the FCC's order violates the ratesetting provisions of the Communications Act that require the FCC to make findings that an existing rate was unjust and unreasonable, or constituted unreasonable discrimination, prior to the imposition of a new rate.[14] AT&T and CompTel argue that the fact that the free passage rule prohibits IXCs from imposing charges on LECs for the interstate transmission of CPN has the practical effect of barring IXCs from seeking a change in its rates.

The FCC responds that the Second R&O did not constitute ratemaking pursuant to section 205, but rather its action was rulemaking pursuant to section 154(i) and (j).[15] An

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[14] 47 U.S.C. § 205 provides in pertinent part:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of the opinion that any charge . . . is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge. . . .

[15] 47 U.S.C. § 154(i) authorizes the FCC to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." Section 154(j) provides in pertinent part that: "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference. *Providence Hosp. of Toppenish v. Shalala*, 52 F.3d 213, 216 (9th Cir. 1995).

AT&T and CompTel base their argument that the FCC impermissibly engaged in ratemaking on a series of cases that hold that "the actual impact of agency action and not its form is decisive." *E.g., AT&T v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973) ("Special Permission" case).[16] These cases do not support their argument. In the Special Permission case, the Second Circuit struck down an FCC order denying AT&T special permission to file a tariff revising existing rates. The court held that the FCC's action interfered with the "careful accommodation of [ratepayer and carrier] interests" underlying the ratemaking provisions of the Communications Act. *Id.* at 873. In the instant case, no IXC has filed a CPN transport tariff. None has been prevented from doing so. The FCC does not act pursuant to section 205 until a tariff has been filed. *PUC of California v. FCC*, 356 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966).

[12] No complaint has been filed with the FCC, nor has the FCC issued "an order for investigation and hearing made on its own initiative" regarding tariffs or charges filed by any IXC. Thus, the requirements of section 205 have not been violated. "Time and again, '[t]he court has recognized that even where an agency's enabling statute expressly requires it

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[16] The following cases are also cited by AT&T and CompTel: *AT&T v. FCC*, 449 F.2d 439 (2d Cir. 1973); *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978); *New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980); and *North Carolina Utility Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977).

to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration.' " *Mobile Oil Exploration & Producing S.E., Inc. v. United Dist. Cos.*, 498 U.S. 211, 228 (1991) (citation omitted). The FCC is entitled to define what constitutes a reasonable policy in terms of the underlying goals of the Communications Act, and to use rulemaking as part of the process of developing and implementing those policies. *National Association of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095, 1120 (D.C. Cir. 1984) (the FCC may use rulemaking to develop policies for interstate communications markets, including policies that affect rates), *cert. denied*, 469 U.S. 1227 (1985). Moreover, we must review these determinations deferentially. *Providence Hosp. of Toppenish*, 52 F.3d at 216. Thus, because the FCC did not impermissibly engage in rate making without following the required procedures, we reject AT&T and CompTel's argument that the FCC violated section 205 of the Communications Act.

CONCLUSION

We conclude that the FCC did not act arbitrarily and capriciously, or contrary to law, in ruling (1) that the preemption of the CPUC's rule was necessary to prevent negation of a valid FCC regulatory goal, and (2) that mandating the imposition of the per call blocking option on subscribers with nonpublished numbers and emergency service organizations that do not make a choice between blocking options does not violate any federal constitutional right. We also uphold the FCC's free passage rule because the record shows that the FCC examined the relevant evidence and adequately explained all aspects of its decision.

The petitions for review are DENIED.

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, 9 FCC RCD 1764 (1994)

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-281

In the Matter of

Rules and Policies Regarding
Calling Number Identification
Service – Caller ID

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

9 FCC Rcd 1764

Comments due: May 18, 1994
Replies due: June 21, 1994

Adopted: March 8, 1994; Released: March 29, 1994

By the Commission: Commissioner Barrett issuing a statement.

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APPENDICES

I. INTRODUCTION.

1. On October 23, 1991, the Commission issued a Notice of Proposed Rulemaking in this docket.[1] More than 100 parties filed comments, including local exchange carriers (LECs), interexchange carriers (IXCs), state governments, public interest organizations, trade associations, and private citizens.[2]

2. In the NPRM, the Commission sought to develop the most effective policies to govern interstate calling party number based services such as caller ID.[3] The NPRM sought comment on carriers' progress in deploying interstate caller ID service, and the technical and public policy implications of dual federal and state regulatory policies.[4] We tentatively concluded that a federal model for the interstate delivery of the calling party's number is in the public interest, and necessary for the introduction of many valuable services, including interstate caller ID.

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[1] *Rules and Policies Regarding Calling Number Identification Service*, (NPRM), CC Docket No. 91-281, 6 FCC Rcd 6752 (1991).

[2] *See* Appendix B for a list of commenters and corresponding abbreviations used in this order.

[3] Caller ID identifies the calling party's telephone number to the called party. As an intrastate service, caller ID allows subscribers, when they receive local telephone calls, to have the local exchange carrier transmit to them the telephone number of the station originating the call. Called parties must subscribe to caller ID from the local telephone company and purchase or lease number identification devices, which are classified as customer premises equipment (CPE). Technology now being deployed – end-to-end interconnected Signalling System 7 (SS7) networks – can support an interstate caller ID service. This proceeding addresses issues in anticipation of interstate caller ID and other calling party number based services becoming available.

[4] NPRM at para. 1.

3. In this Order, we find that a federal model for interstate delivery of calling party number is in the public interest, that calling party privacy must be protected, and that certain state regulation of interstate calling party number (CPN)[5] based services, including interstate caller ID, must be preempted. We amend Part 64 of the rules to require that common carriers using Common Channel Signalling System 7 (SS7) and subscribing to or offering any service based on SS7 functionality must transmit the calling party number parameter and its associated privacy indicator on an interstate call to connecting carriers. We also require that carriers offering CPN delivery services provide, at no charge to the caller, an automatic per call blocking mechanism for interstate callers. The rules require that terminating carriers providing calling party based services, including caller ID, honor the privacy indicator. We find that the costs of interstate transmission of CPN are *de minimis*, and that the CPN should be transmitted among carriers without additional charge. We also require that carriers participating in the offering of any service that delivers CPN on interstate calls inform telephone subscribers that the subscriber's number may be revealed to called parties and describe what steps subscribers can take to avoid revealing their numbers. Further, we adopt rules to restrict the reuse or sale of information generated by automatic number identification (ANI) or charge number services, absent affirmative subscriber consent.[6] Finally, we note that additional

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[5] The calling party number is the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call using SS7. The calling party number parameter includes an associated privacy indicator.

[6] Automatic Number Identification (ANI) based services were developed in the pre-SS7 (multifrequency) signalling environment as the

comments are sought through a separate public notice in the *Computer III* Remand Proceeding on whether residential and small business customers' privacy concerns warrant revision of the Commission's rules governing reuse and sale of customer proprietary network information (CPNI).[7] In the Further Notice of Proposed Rulemaking, we seek comment on whether more detailed customer education rules should be adopted. We also seek comment on extending the policies adopted herein to other services that might identify the calling party.

II. DISCUSSION.

A. Calling Party Number Services Should be Available to Interstate Subscribers Nationally.

4. *Risks and Benefits.* In the NPRM, the Commission stated its tentative view that the availability of interstate caller ID would enhance the value of the service to intrastate

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billing telephone number of the calling party, and are transmitted primarily on toll/access calls on the trunk side connection of the LEC switch. The service is used by LECs and IXCs to identify telephone numbers for billing purposes, but has been made available to customers who subscribe to 800 and 900 services. Delivery of ANI to a subscriber requires a dedicated line between the IXC and the business subscriber and is transmitted directly to that subscriber, bypassing the terminating LEC. *See* NPRM at para. 5. Because it transmits essential billing information and predates SS7 technology, ANI is not blockable in the same way as the calling party number in an SS7 network. In an SS7 environment, ANI may be delivered via a charge number parameter, which does not contain a privacy indicator as does a calling party number parameter.

[7] *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7605-14 (1991) (enhanced services CPNI rules).

subscribers and augment the available choices of existing interstate services for all subscribers. The Commission noted that the ability to choose caller ID and other services that rely on access to the calling party's number should be available to interstate subscribers nationally.[8] The majority of commenters supported this view and described in detail the potential benefits to the public of services based on the calling party's number.

5. In its comments, AT&T identified potential uses of interstate calling party number for such services as pay-per-view television, order entry/verification, voice message storage, secure computer access, customized customer service, business fraud reduction, call routing, emergency dispatch, health care services, telephone banking, home shopping, dealer locator, and selective call message forwarding. McCaw states that caller information will significantly improve cellular and other service offerings because cellular subscribers pay for incoming calls. Moreover, McCaw notes that ubiquitous caller ID will facilitate cellular enhancements including conventional caller ID, more responsive customer service, new cellular CPE voice synthesizers, and service for roaming subscribers. SNET states that its studies show that caller ID aids persons with hearing impairments in answering calls; law enforcement in determining crank, threatening, false alarm calls and emergency dispatches; and hospital crisis centers in identifying and deterring nuisance calls.

6. In contrast, Colorado DVC asserts that caller ID is not in the public interest because of the threat it poses to the privacy and safety interests of the calling party. Colorado

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[8] *Id.* at para. 8.

Consumer contends that call trace is the preferable service to stop obscene and harassing calls. Bell Atlantic replies that call trace will not work if another call is received before tracing is attempted, and that customers who have used both caller ID and call trace prefer the former. Consumer Action, Washington UTC, and NYS Law agree with Colorado DVC that caller ID has little merit and may threaten public health and safety as well as jeopardize important privacy interests.

7. While we agree that passage of the calling party number does create risks of lost privacy, we must weigh these risks against the potential benefits brought by interstate services that passage of the calling party's number makes possible. Other services available to protect subscriber privacy, such as Call Trace, are limited in scope and do not permit either the public or service providers to take advantage of beneficial services. The commenters briefly discuss some of these benefits. For example, computer systems could limit remote access only to previously approved calling numbers, with calling party number based services like caller ID making verification for access nearly instantaneous. Service providers who respond to telephone orders, such as stock brokers or parts and equipment dealers, could use the calling party's number to direct the call immediately to the appropriate department for service. Banks could program data sources to have customer profile information available as a call is answered. With interstate delivery of calling party number, calls to national service centers could be routed automatically to local service centers closest to the calling party. Consumers making orders could have their name, address and billing information verified instantaneously. Indeed, a significant number and kind of customized national services can develop as a result of instant recognition of the calling party.

8. Many of these potential services would permit transactions to occur more efficiently. In an economy that averages more than one billion interstate calling minutes a day, even small efficiencies on individual calls could become significant in the aggregate. Providing the public with rapid and efficient interstate telecommunications services is at the heart of our responsibilities, particularly if they can be provided at very little additional cost. As illustrated above, passage of the calling party number can promote technological innovation and new applications that will foster economic efficiency and provide new employment, manufacturing and investment opportunities.

9. None of these services and benefits are possible, however, unless the calling party number is passed freely among carrier networks. It is significant that the categories of those benefiting from these new opportunities are very broad. For example, consumers and individuals benefit by having additional options for meeting their customer service needs and by having transactions completed more quickly and more accurately. As workers and entrepreneurs, they benefit by having new employment opportunities. Businesses benefit because they can complete transactions more quickly, which can lower incremental costs of transactions, potentially leading to savings for consumers. Telephone companies benefit by revenues from new services, and by greater use of their networks. Greater use of CPN based services by consumers and service providers will create incentives for carriers who do not have SS7 networks to install them. This will enhance the nation's telecommunications infrastructure, to the benefit of all who use it. Most of the comments directed against our proposal in the NPRM are based on legitimate concerns that individuals have access to a means of protecting their privacy

where doing so is important. We believe technology can address these concerns regarding protections for individual privacy. Accordingly, we find that the potential benefits of services based on calling party number serve the public interest and affirm the NPRM's tentative conclusion that CPN-based interstate services such as caller ID should be available to interstate subscribers nationwide.

10. *Deployment by Carriers.* In the NPRM, the Commission sought detailed comments on carriers' progress toward establishing joint offerings of CPN-based services, and any impediments that have been identified.[9] The record does not reflect extensive response to that inquiry. It appears that although the deployment of the necessary technology for interstate calling party number based services is well underway, other factors have impeded progress. In particular, varying state regulatory responses to privacy issues appear to be impeding the development of interstate services. Moreover, commenters express concern that this lack of national uniformity in regulating interstate SS7 calling party number based services may eliminate a source of the revenues expected from such services. In their comments, Rochester, Ameritech, BellSouth, GTE, McCaw, and US West support a national policy for caller ID because federal standards are essential to achieve the goals of nationwide availability of calling party number based services. McCaw states that it supports a federal policy for caller ID and ANI that accommodates both state concerns and industry diversification and experimentation. In contrast, Allnet contends that there is no compelling federal interest to promote nationwide availability of caller

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[9] NPRM at para. 11.

ID and that if there is a demand for interstate caller ID, market forces will assure its availability.

11. The record reflects that national policies on interstate CPN-based services such as caller ID are needed to reduce risks of stranded investment and to remove impediments to development of services consumers are likely to find beneficial. In addition to providing additional choices for consumers, such services offer significant efficiency dividends for all users of interstate telephone services. These efficiency gains promise to lower incremental costs of interstate calling party number based services, including caller ID, and increase national productivity. Carriers may be wary to invest in technology or delivery systems that may later become incompatible with the varying state requirements or incapable of satisfying federal policy. Resolution of privacy, blocking, and preemption issues is necessary to enable the benefits of these services to occur. By removing impediments created by administrative uncertainty, we seek only to resolve those issues necessary for the efficient introduction of the services. The effective date of the rules adopted here will be April 12, 1995, which should allow sufficient time for completion of any coordination or other arrangements, discussed infra, necessary for full compliance with the rules.

B. Transmission of the Calling Party Number throughout the Network.

12. In the NPRM, we tentatively concluded that the transmission of the CPN by the LEC to the IXC is an essential element of interstate CPN-based services such as caller ID. The Commission proposed that LECs should be required to provide CPN to IXCs as soon as technologically feasible and,

similarly, that IXCs should be required to transmit CPN to terminating LECs.[10]

13. AT&T states that requiring IXCs to transmit interstate CPN to LECs is unnecessary because the competitive market already gives IXCs incentive to offer innovative interstate caller ID services to end users. Moreover, AT&T contends that such a requirement would deprive IXCs of the ability to earn revenues from their substantial investments in SS7 technology. Allnet argues that the requirement would compel all IXCs to participate in SS7 interconnection, thus compromising network integrity.

14. Ameritech, Nynex, Pacific, Centel, and NTIA concur that the Commission should facilitate the provision of interstate caller ID by requiring passage of the calling party's number between carrier networks without modification. MCI agrees that the Commission should require LECs to provide the CPN to IXCs, but it opposes any requirement that IXCs be required to transmit the CPN to the terminating LEC because it states the LEC would then be the lone provider of caller ID. In opposition, BellSouth contends that the transmission of the CPN is essential, and as part of SS7 does not require additional network processing by the IXC nor impose significant cost. Further, BellSouth argues that free delivery of the CPN to terminating LECs would not establish LECs as monopoly providers; rather, IXCs could develop competing CPN-based interstate services that bypass LECs as terminating carriers. NTIA and USTA assert that an IXC's offering of the calling

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[10] *Id.* at para. 12.

party number should be available through all means of interconnection to end users, including LECs, alternative local service providers, or the IXC itself.

15. Nynex proposes that mandatory delivery of the calling party number parameter among all networks is in the public interest. Further, Nynex supports McCaw's proposal that technical standards for transmission of caller ID and ANI between cellular and landline carriers be developed.[11] However, it notes that cellular carriers do not receive ANI from Nynex because transmission of ANI to cellular carriers is not technologically feasible.

16. We affirm our tentative finding that interstate CPN-based services such as caller ID will not be possible unless the calling party number is transmitted from the originating carrier to the terminating carrier. In our 800 number portability proceeding, major LECs filed access tariffs providing for 800 number portability using SS7 technology.[12] Many Bell Operating Companies (BOCs) have filed access tariffs with CPN as a nonchargeable option. Calling party number is an element of access service in virtually all SS7 access tariffs filed at the Commission and these tariffs follow industry standards for SS7 interconnection. The American National Sandard for Telecommunications – Signalling System Number 7 (SS7) – Integrated Services Digital Network, ANSI T.113, 1988, includes calling party number as an optional parameter of an SS7 network. Similarly, the subsequent

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[11] *See* discussion of ANI in Section F, *infra*.

[12] Provision of Access for 800 Service, 4 FCC Rcd 2824 (1989), *modified*, 6 FCC Rcd 5421 (1991).

BellCore guidelines for SS7 interconnection with a BOC include CPN as an optional parameter.[13]

17. We conclude that carriers should pass calling party number information where capable of doing so. In view of the foregoing, we amend Part 64 of the rules to require that not later than April 12, 1995, common carriers using Signalling System 7 and subscribing to or offering any service based on SS7 functionality must transmit the calling party number parameter and its associated privacy indicator to connecting carriers on an interstate call.[14] Further, we amend the rules to prohibit common carriers from modifying or overriding the privacy indicator on an interstate call. We emphasize that carriers are not required to invest in SS7 technology in order to facilitate delivery of the calling party number. Carriers are only required to transmit the CPN and privacy indicator where technically feasible. Because transmission of the calling party number requires SS7 technology, technical feasibility exists wherever SS7 technology is used. We now turn to the issue of the costs associated with the transmission of the CPN.

C. Costs of Interstate Transmission of Calling Party Number.

18. Most IXC commenters contend that, if required to transmit the calling party number, IXCs should be compensated for such transmission. AT&T avers that IXCs incur costs in acquiring and delivering interstate CPN and that its

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[13] Common Channel Signalling (CCS) Network Interface Specification, Bellcore, TR-TSV-000905 (Issue 1, August 1989).

[14] *See* Appendix C.

decision to invest in SS7 rested in part on the anticipation of revenue from new services such as caller ID. MCI concurs with AT&T and further contends that IXCs already pay for calling party numbers as part of feature group D switched access and are developing services which will provide the called party with the calling party's telephone number. Allnet proposes that IXCs who do not voluntarily engage in forwarding caller ID should not bear any of the costs of deployment. Metromedia argues that carriers terminating calls should be responsible for billing those called parties subscribing to interstate caller ID where appropriate; terminating carriers should compensate IXCs passing the information.

19. Nynex believes that if the CPN is passed freely from carrier to carrier, then each carrier may use it to provide services to end users, consistent with cost-based rather than market-based pricing for Open Network Architecture service offerings. Bell Atlantic agrees that if IXCs are allowed to charge for calling party number the cost to consumers will be unnecessarily increased. United States that a single price established in the local jurisdiction for all caller ID regardless of jurisdiction is appropriate. United cites to the precedent for local service pricing of custom calling features like call forwarding of interstate toll calls.

20. SWB concurs with other commenters that CPN should be passed from carrier to carrier at no charge because it is an intrinsic part of SS7 call setup and no cost is associated with filling the calling party number parameter in the SS7 message. SWB disagrees with IXCs such as AT&T, MCI, and Allnet which assert that charging for passage of the CPN would permit them to share in revenues from the LEC's services that depend on passage of the calling party number. In essence, states SWB, the IXCs want to charge for the

passage but receive it free. SWB proposes that the Commission require passage at no charge, thus eliminating extra charges which would be passed on to consumers.

21. McCaw agrees with SWB that CPN should be passed free of charge. McCaw asserts that to encourage maximum possible participation of all carriers as co-equal carriers, the Commission should prohibit compensation among carriers that pass ANI or caller ID information because the costs of ANI and caller ID are recovered in the overall SS7 costs. Centel argues that IXCs should be prohibited from charging either the originating or terminating LEC for transport. Centel asserts that revenue sharing issues should be resolved between carriers, and notes that it would cost IXCs more to remove the CPN from their systems than to allow passage to terminating LECs.

22. CFA, Colorado DVC, Maryland PC, Michigan PSC and others argue that costs associated with caller ID should be borne by subscribers to the service. The Illinois CC notes that it has ordered that the costs of providing per call blocking be borne by those who subscribe to caller ID. IIA proposes that the per call blocking costs should be imposed upon the calling party on the theory that suppression of the calling number is a special service the cost for which should be borne by the party who chooses to invoke it. Consumer Action contends that LECs are improperly allocating the costs of the SS7 switches and supports this contention with data which it believes show that the body of ratepayers is subsidizing SS7-based service, which only benefits 5-6% of telephone customers.

23. We find that the unimpeded flow of the calling party number throughout the network ensures the greatest

diversity of offerings to subscribers and eliminates costs that can delay or impede development of CPN based services. To the extent these services improve productivity, lower incremental costs and create new employment, investment and other opportunities, they benefit a wide range of consumers and producers. As noted above, industry standards already include calling party number as an optional parameter of an SS7 network, and the calling party number is an element of access service in virtually all SS7 access tariffs filed at the Commission. In most cases, SS7 signalling replaces older signalling methods used in an IXC network and provides benefits to the carrier such as more efficient call routing and reduced exposure to fraud. We thus conclude from the record before us that the costs of transmitting CPN are *de minimis*, and that accordingly, the calling party number parameter and associated privacy indicator should be transmitted among carriers at no additional charge.

D. Interstate Caller ID Privacy Issues.

24. In the NPRM, we balanced the privacy interest of the called party against the privacy interest of the caller and proposed that interstate caller ID should include some measures to protect calling parties' privacy. We sought comment on whether these privacy interests are matters of public policy or are constitutional in nature. We noted that any regulatory response to protect the privacy interest of the calling party should take into account the public benefits of caller ID and should not undermine the value of the service overall.[15] Most commenters agree that societal expectations of privacy

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[15] NPRM at paras. 14-15.

require that interstate caller ID include some type of privacy protection mechanism.

25. *Constitutional Issues.* AT&T contends that the provision of interstate caller ID by private telephone companies does not implicate the U.S. Constitution, which, AT&T argues, does not regulate private activity relevant to this proceeding. GTE concurs with AT&T and adds that in recent cases the courts found no state action was involved when a LEC refused to provide communications service or billing and collection service to dial-a-porn providers.[16] Further, GTE argues that in *Smith v. Maryland,* 442 U.S. 735 (1979), (*Smith*), the U.S. Supreme Court held that there is no federal constitutional protection from disclosure of digits dialed on the network.

26. In opposition, Georgia CUC cites to testimony before the Georgia PUC that concludes that information is constitutionally protected when a legitimate expectation exists that the information will remain confidential.[17] California PUC contends that there exists a non-frivolous claim that the First Amendment right to free speech includes a right of the calling party not to be compelled to disclose his or her telephone number.[18] Ohio OCC concurs that there is an

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[16] GTE cites *Dial Information Services Corp. of New York v. Thornburgh,* 938 F.2d 1535 (2d Cir. 1991), (DISC), and *Information Providers' Coalition v. FCC,* 928 F.2d 866 (9th Cir. 1991), (*Information Providers*).

[17] Georgia CUC also cites *Mangels v. Pena,* 789 F.2d 836, 839 (10th Cir. 1986), (*Mangels*).

[18] California PUC cites *Pacific Gas and Electric Co. v. Pub. Util. Comm'n of California,* 475 U.S. 1, 10-11 (1986) for the proposition that an individual's First Amendment right not to speak may not be vitiated as a condition for his/her use of the telephone network.

identifiable federal constitutional privacy interest that includes telephone digits and supports this argument citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) (the right to make decisions about procreation) (*Griswold*), and *Whalen v. Roe*, 429 U.S. 589 (1977) (individual interest in avoiding disclosure of personal matters) (*Whalen*). Pennsylvania PUC states that the Commonwealth Court of Pennsylvania held that caller ID is *per se* unconstitutional under the Pennsylvania state constitution because of the theoretical risk that a caller wanting to remain anonymous would accidentally forget to use the available blocking feature.

27. The record and case law demonstrate that there is no federal constitutional bar to the offering by carriers of CPN-based services such as caller ID. In *Smith*, the Supreme Court held that there is no privacy right under the Fourth Amendment protecting telephone numbers from disclosure because the application of the Fourth Amendment depends on whether first, the person invoking protection can claim that a "legitimate expectation of privacy" has been invaded by the government. In *Smith*, pen register records kept upon police request by a telephone carrier on calls made by a robbery suspect became evidence used to convict him on robbery charges. At issue was whether seizure by police of the record of phone numbers that the suspect called constituted a "search" for Fourth Amendment purposes and thus required a warrant. The court's decision rested upon analysis of whether the individual exhibits an expectation that something will remain private, and second, whether the individual's subjective expectation of privacy is one which society is prepared to recognize as objectively reasonable. *Smith* at 740. The court held that the expectation of privacy for phone numbers is not one that society is prepared to recognize as reasonable,

because when one voluntarily exposes his phone number to the telephone company's equipment, one assumes the risk that the company may reveal the number to others. *Id.* at 743-45. The Court also drew a distinction between the content of a phone conversation and the number dialed and found that protecting the content is more important than the number dialed because phone numbers are not communication in and of themselves, but merely establish that communication has been attempted. *Id.* at 741.

28. The Pennsylvania state court ruling cited by the Pennsylvania PUC does not suggest otherwise. The Commonwealth Court struck down Pennsylvania PUC's order which had approved caller ID in part because the court found that, even with a blocking mechanism, caller ID violates Pennsylvania constitutional privacy rights.[19] The constitutional privacy right asserted in *Barasch* rests on the court's interpretation of the Pennsylvania Constitution. *Id.* at 87, 89. However, the U.S. Constitution is not cited in *Barasch* as imposing any privacy right in a phone number; indeed, such an interpretation would be inconsistent with *Smith*. Moreover, on appeal, the Supreme Court of Pennsylvania held that caller ID violates the "trap and trace" provisions of the state wiretap law and did not address the constitutional privacy issue.[20]

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[19] *Barasch v. Pennsylvania Public Utility Commission*, 576 A.2d 79 (Pa. Cmwlth. May 30, 1990), *aff'd sub nom, Barasch v. Bell Telephone Co. of Pennsylvania*, 605 A.2d 1198 (Pa., March 18, 1992) (*Barasch*).

[20] In December of 1993, Title 66 of the Pennsylvania Consolidated Statutes was amended to declare that caller ID is a lawful service if it permits a caller to withhold display of the caller's telephone number and other identifying information from the called party on both a per-call and per-line basis. *See* 66 PA. CONS. STAT. § 2906 (1993).

29. GTE cites two cases (*supra*, note 16) in support of the principle that common carriers are private entities and thus no state interference with individual privacy rights is involved. *DISC* involves a challenge by dial-a-porn companies to the Helms Amendment, 47 U.S.C. §§ 223(b) & (c), which allows phone companies to require dial-a-porn services to notify them that they will be providing indecent messages and/or to require dial-a-porn services to utilize independent billing. The Court of Appeals held that no prior restraint of free speech was created by the statute because no governmental action was involved. The statute merely permits phone companies to choose whether to provide billing services to dial-a-porn companies. Similarly, *Information Providers* involves a challenge to Section 223 of the Communications Act of 1934, as amended, 47 C.F.R. § 64.201 (1991). The court held that carriers are private companies, not state actors, and are, therefore, not required to continue, restrict, or terminate services of particular users and that a carrier is free under the constitution to terminate service to dial-a-porn operators altogether. These cases generally support the proposition that when a carrier can choose whether to offer certain services, no state action is involved.

30. On the basis of this body of law and the record, we find that the offering of caller ID does not violate privacy rights protected by the U.S. Constitution.[21] Constitutional protections of privacy relate to government action and no

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[21] *Mangels, Griswold,* and *Whalen* are inapposite. As the Court said in *Mangels*, "[t]he legitimacy of any individual's expectation [of privacy] depends, at least in part, upon the intimate or otherwise personal nature of the material. . . . " *Mangels* at 839. As the Court held in *Smith*, telephone numbers do not rise to a level of personal or intimate information.

government action is involved here. Moreover, we find that federal courts have not, to date, recognized an individual privacy right in telephone numbers.[22]

31. *Public Policy and Privacy Mechanisms.* The majority of commenters agree that the privacy interests associated with caller ID are a matter of public policy or societal expectation. California Consumer Affairs proposes that federal interstate caller ID policies must recognize that the governmental interest in protecting public health, safety and welfare dictates that some blocking option be available. NY Law Project underscores that with a relatively inexpensive personal computer and a CD ROM reader, a business caller ID subscriber could access data bases and display a data profile of a caller even before the telephone is answered, or while the call is in progress. SWB recognizes the need to protect the confidentiality of non-published numbers, undercover police officers, domestic violence shelters, and the integrity of hotlines. Massachusetts contends that the effective functioning of law enforcement in Massachusetts would be compromised if caller ID were offered without a privacy protection mechanism. GTE, however, asserts that tariff language requires that

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[22] The California PUC's reliance on *Pacific Gas. v. California* to link caller ID services with a constitutionally protected right not to speak is misplaced. In *Pacific Gas v. California* the Court considered whether the California PUC could require a privately owned telephone utility to include in its billing envelopes speech of a third party with which the utility disagrees. The Court held that the California PUC's order impermissibly restricted billing envelope access to only views with which the telephone utility disagreed. In no instance did the Court reconsider its prior holding in *Smith* that there is no constitutionally recognized expectation of privacy that attaches to phone numbers.

the caller identify himself to the called party.[23] Nynex contends that caller ID redresses a longstanding imbalance which favored the calling party because the called party had no information on which to decide whether or not to answer the telephone.

32. BellSouth proposes that with all number delivery, callers can protect their identity by calling from telephones not recognizable by the called party. BellSouth states it has developed specialized service offerings for the privacy concerns of law enforcement and domestic violence shelters. Bell Atlantic also advocates unrestricted delivery on the premise that per call blocking is used infrequently and provides malicious callers the opportunity to continue to make harassing calls. MCI states that delivery of the calling party number should be unrestricted because unlimited availability of customer initiated blocking will undermine the service and diminish its value to the public. However, MCI concurs with BellSouth that limited blocking should be available to protect public safety groups. USCG proposes that any blocking mechanisms not apply to calls made to United States Coast Guard emergency telephone numbers. USTA is in favor of unrestricted delivery of caller ID across all carrier networks, whether interstate or intrastate. However, USTA proposes that per call blocking for specific applications may be appropriate.

33. IIA argues that unrestricted delivery of caller ID threatens a broader concept of information privacy – a right of the individual to control the dissemination of information about one's self and one's activities. Kentucky states that Bell

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[23] GTE cites, *inter alia*, GTOC Tariff FCC No. 2 Section 2.3.1; AT&T Tariff F.C.C. No. 1, Section 2.4.1.C.

Atlantic's claims of reduced harassing and obscene calls appear to be more a function of changes in the handling and routing of such calls than any real reduction on the actual placing of these calls. Ohio OCC states that unrestricted delivery of caller ID would undermine the ability of professionals who must work from their residence, and that public hearing testimony in Ohio resounded with consumer objections to disclosure of non-published numbers.

34. Most commenters do not advocate completely unrestricted delivery. Even those commenters that advocate unrestricted delivery suggest a limitation on availability of the CPN under specific circumstances. In light of the extensive record before us, we conclude that a regulatory framework for interstate CPN-based services such as caller ID should include some type of privacy protection mechanism. We affirm our prior tentative conclusion that the calling public has an interest in exercising a measure of control over the dissemination of telephone numbers that must be reflected in federal policies governing caller ID service. We discuss specific privacy mechanisms in Section E below.

35. *Private Networks, Emergency Services, and Law Enforcement.* AT&T proposes that there should be no blocking mechanisms prescribed for private or virtual private networks because blocking on business services and on private networks would intrude on the rights of private and virtual private network owners to determine the amount of information delivered on internal calls carried on their networks. AT&T and GTE concur that business services do not commonly implicate personal safety concerns and in a business context, identification is expected. The NPRM sought comment on whether blocking mechanisms jeopardize calling party identification by emergency services. USCG states that

blocking mechanisms should not apply to calls made to emergency telephone numbers because they could degrade emergency service operations. Pacific Bell notes that emergency services could be affected where an individual calling line identification display device is being used in place of the standard public safety answering point console arrangement.

36. In the NPRM, we proposed that the privacy requirements adopted herein to address the privacy concerns within the public network should not apply to communications within private or virtual private networks. We affirm that privacy expectations of the calling party are different when they arise in the context of internal calls within a single private network. Moreover, commenters did not dispute that caller ID systems raise very limited privacy expectations if used solely in connection with legally authorized call tracing and trapping procedures specifically requested by a law enforcement agency. We do not apply the privacy requirements adopted in this order to these narrow sets of circumstances.

37. The record indicates that blocking mechanisms do not affect Enhanced 911 services, which currently locate the calling party on emergency calls via ANI rather than SS7-based caller ID services, which include blocking mechanisms.[24] However, as indicated by USCG and Pacific Bell, blocking mechanisms may jeopardize emergency services which rely on caller ID and thus pose a serious threat to public health and safety.[25] To the extent that CPN based services are used to deliver emergency services, we find that

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[24] *See, e.g.*, Nynex at 14, n. 18.

[25] *See* Appendix C, § 64.1602(d).

privacy requirements for CPN based services should not apply to delivery of the CPN to a public agency's emergency line, a poison control line, or in conjunction with 911 emergency services. We now turn to specific privacy protection mechanisms for assuring that the interstate public network includes a privacy protection option.

E. Privacy Protection Mechanisms, Further Notice of Proposed Rulemaking.

38. The three privacy protection mechanisms prevalent at the state level are (1) per line blocking provided by the telephone company for specific groups (2) per line blocking provided by the telephone company for all customers except those who want their telephone numbers to be delivered, and (3) per call blocking on an automatic or operator assisted basis. Additionally, these options can be offered in combination and free to the user or on a fee basis. In the NPRM, we sought comment on and analysis of the relative merits, technical feasibility and foreseeable costs to carriers and customers of establishing a requirement that interstate caller ID incorporate a per call blocking option.[26] The record demonstrates ample support for the adoption of an automatic per call blocking requirement on interstate caller ID offerings. We discuss each alternative below and affirm the tentative conclusion reached in the NPRM that carrier provided per line blocking mechanisms are unduly burdensome. We affirm that automatic per call blocking is the most responsive alternative to the needs of calling and called parties for interstate calls. Finally, we request comment on whether, and how, these

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[26] NPRM at para. 20.

policies should apply to other services, such as delivery of the calling party name.

39. *Per Line Blocking for Specific Groups.* Pennsylvania PUC states that per call blocking should be available to all subscribers, but free per line blocking should be made available to groups that demonstrate a higher privacy need than the population at large. These groups include non-profit, tax-exempt domestic violence agencies; home telephone numbers of staff members of such agencies; federal, state and local law enforcement; and individuals who have a need for blocking to mitigate the risk of personal injury, as certified by a law enforcement agency. MCI proposes a limited blocking option to protect public safety groups. US West states that its experience with free per line blocking for "special needs" subscribers proved cumbersome and unfair because US West is uncomfortable with determining what groups or individuals have special needs.

40. Commenters that advocate the availability of per line blocking only for certain groups with heightened privacy needs do not address how this mechanism would be implemented on an interstate basis. The two entities that could determine eligibility for privacy protection under this proposal would be the carriers or the government. If the choice is left to the carrier or carriers offering interstate caller ID, the carrier must determine which individual subscribers are entitled to privacy protection. Issues that arise in this determination include: Do certain types of law enforcement personnel have greater needs than others? Do domestic violence shelters have greater needs than teenage runaway facilities? Do individuals who work for these organizations have needs? How would these individuals be identified? How would determinations be kept current? What appeal rights would be available?

These social questions are generally not the type of issues resolved by carriers. We conclude, on the basis of this record, that per line blocking for a special needs category as a federal model is not optimal. It would unnecessarily increase the role of the federal government or carriers in making privacy choices for subscribers. Other regulatory alternatives to address privacy are available on a more equitable basis and do not unduly hamper the viability of CPN based services.

41. *Per Line Blocking Available to All Subscribers.* Consumer Action contends that the only way to ensure that all residential customers do not involuntarily deliver their numbers to caller ID equipment is to require availability of per line blocking. Consumer Action supports its argument that per line blocking would not undercut the usefulness of caller ID by citing Centel's statement that, after 6 months of offering caller ID with a per line blocking option, there was no substantial decrease in individuals subscribing to caller ID. Missouri Counsel states that the absence of free per line blocking effectively eliminates the protection that unlisted numbers provide.

42. DMA asserts that per line blocking would drive up the cost of service and further, that if per line blocking becomes widespread, direct marketers may be unable to use caller ID service for a substantial segment of their customer base, and smaller businesses may find the service unattractive. Rochester notes that in a survey it conducted, 66% of respondents made 75% of their calls to people who already knew their telephone number, and 83% made at least 50% of their calls to people who knew their number. Rochester concludes that per line blocking is only marginally useful and substantially degrades the value of caller ID by causing unnecessary blocked calls. USTA concurs that in the vast

majority of calls, identification of the calling number is of little consequence to the calling party. AT&T points out that per line blocking destroys the lifesaving potential of caller ID for line blocked callers of emergency numbers such as police stations because a caller in distress may forget how to use the unblocking code.

43. In the NPRM, we tentatively concluded that per line blocking unduly burdens calling party number based services overall by failing to limit its applicability to those calls for which privacy is of concern to the caller. The Commission noted that even in the case of law enforcement personnel, there may be a need to maintain calling number privacy on some calls, but that the same number may be used to telephone other law enforcement personnel, victims of crimes, cooperative witnesses, and family or friends. The Commission asserted that in these types of calls, calling number privacy is not needed and calling number identification can actually be a valuable piece of information for both the caller and called parties. The record reflects the useful nature of CPN based services, and the comments of Rochester illustrate that callers are likely to be interested in blocking only a small percentage of their calls. The comments of USCG illustrate the usefulness of caller ID to emergency services. In contrast, Missouri Counsel's analogy to unlisted numbers is inapposite because caller ID only permits parties called by the calling party to capture the calling party number, and then only if the calling party has not activated a per call blocking mechanism. We find that the availability of per call unblocking does not cure the ill effects of per line blocking. Moreover, in an emergency, a caller is not likely to remember to dial or even to know to dial an unblocking code. For the foregoing reasons, we find that a federal per line blocking requirement for

interstate CPN based services, including caller ID, is not the best policy choice of those available to recognize the privacy interests of callers. Thus, carriers may not offer per line blocking as a privacy protection mechanism on interstate calls. We agree that certain uses of captured calling numbers need to be controlled, and address that issue *infra*.

44. *Operator Assisted Per Call Blocking.* There is little support in the record for operator assisted per call blocking. Live operator assisted blocking may have a chilling effect on callers who do not choose to disclose the calling number. Dialing three additional digits to invoke privacy as is required with automatic per call blocking is much less cumbersome to the caller than having to connect to a live operator and explain that the caller wishes to place an anonymous call. The practical effect of a system of operator assisted blocking appears to be that privacy is not invoked, based on the Canadian experience wherein out of one million calls, only two were blocked.[27] We also note that live operator assisted blocking was not envisioned as part of the technology of caller ID during the SS7 standards setting process. The ANSI and Bellcore standards contemplate automatic per call or per line blocking. If the advanced technology of the network is capable of sustaining an automated blocking function, it is not in the public interest to ignore the technology and require less efficient, more cumbersome live operator assistance.

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[27] *See Bell Canada – Introduction of Call Management Service,* Telecom Decision CRTC 90-10 (May 9, 1990). The Canadian Radio-television and Telecommunications Commission now requires free automatic per call blocking; Bell Canada has discontinued free operator assisted per call blocking. See *Call Management Service – Blocking of Calling Number Identification*, Decision CRTC 92-7 (May 4, 1992).

45. *Automatic Per Call Blocking*. Under this approach, a caller dials a three digit code, e.g. *67 (or 1167 for rotary or pulse-dialing phones), to indicate that the calling number should be blocked. The majority of commenters supporting a per call blocking system advocate an automatic free per call method. For example, the Ad Hoc Users and NTIA state that per call blocking best balances the privacy interests of both the calling and the called party. Although Bell Atlantic opposes blocking, it states that if the Commission decides to require blocking, per call rather than per line should be adopted. The IIA notes that several states already require free per call blocking. Further, IIA proposes that the Commission take into account that consumer expectations have solidified on this issue.

46. We agree with the majority of commenters that availability of automatic per call blocking best addresses the privacy needs of both the calling and called parties. We note that the majority of jurisdictions using this method on a local basis are using *67 (or 1167 for rotary or pulse-dialing phones) as the dialing digits and we adopt the same dialing method in our interstate rules. As discussed in the NPRM, a regulatory approach to privacy should not be so burdensome to the service that it destroys its value and thus fails to take into account the privacy needs of the called party. Per line blocking has this effect. On the other hand, a blocking mechanism should not be so difficult to invoke as to fail to recognize the legitimate privacy concerns of some callers. Operator assisted blocking has this effect. The best balance for the competing interests of the calling and called parties is automatic per call blocking. The option of dialing a few additional numbers to invoke privacy when privacy is sought is a beneficial service that should be available to consumers. Similarly,

caller ID is beneficial to the called party who should be able to receive the calling party number in all instances where identification of the calling number is of no consequence to the caller or where the caller may desire identification.

47. The rules require per call blocking as the model for privacy protection on interstate calls. As a matter of simplicity and uniformity, per call blocking allows callers to travel from phone to phone and make an informed privacy decision. Per line blocking may create caller confusion when a caller places a call from a phone over which the caller may be uncertain whether it is equipped with per line blocking. It appears that some carriers offering per call unblocking together with per line blocking use the same *67 code both for unblocking presubscribed privacy lines and for blocking lines that are not pre-blocked. Thus, a caller may inadvertently disable privacy protection by dialing *67 (or 1167 for rotary or pulse-dialing phones) to invoke privacy from a phone that is already subscribed to per line blocking. A per call blocking system avoids this unintended result and allows callers to make decisions according to the unique calling circumstances of each call. Automatic per call blocking is easily used on a ubiquitous interstate basis, and eliminates customer confusion.

48. Our objective in this proceeding is to establish federal policies governing the passage by carriers of CPN on interstate calls. We believe carriers should provide callers the option of withholding their numbers from called parties on a per call basis. It is important to note, however, that consumer choice is not limited to the options provided by carriers. Various companies have registered with the Commission, under provisions of Part 68 of our rules, equipment that, for example, automatically would insert a blocking prefix on each

call going out over a particular line. Such devices are available for as little as $40.00 per unit. We believe general interstate passage of CPN throughout the telephone network, except in those individual circumstances where privacy is important to the calling party, promises important efficiency and productivity gains for our economy. However, individuals wishing to install these devices and thereby screen all originating interstate calls may elect to do so.[28] Such a choice may create caller confusion if others entitled to use the line are unaware of the purpose of the device, or may place health and safety at risk if the device conceals the calling party's location or identity from emergency services, but these are not harms to the network. Requiring callers seeking universal blocking to purchase such devices, however, ensures this choice is not made lightly.

49. The majority of commenters supporting per call blocking also propose that per call blocking be free to the calling party. We note that this is in keeping with the blocking policies adopted by the majority of states for intrastate calls. Per call blocking capability is an inherent capability of SS7 technology. The design of caller ID contemplates the use of software programs that permit either a customer to activate a "block" on any particular call, or the central office to activate a block on the line. In no circumstance is the information actually "blocked" from the carrier; the terminating central office will receive the calling number. In addition, on all

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[28] The policy underlying Part 68 registration of customer premises equipment is that consumers should be able to attach to the telephone network devices they find to be privately beneficial that are not publicly detrimental, in other words, that do not cause harm to the network.

interstate calls handled by SS7, the call setup message contains a calling party number parameter that includes a privacy indicator. Under our rules, this "privacy flag" travels with the call setup message through to the destination central office of the terminating carrier. Thus, there are no significant additional SS7 costs associated with per call blocking. Several commenters note that there are costs associated with populating the privacy flag at the originating end and reading it and passing it on to the subscriber at the terminating end. Our requirement that carriers transmit CPN includes the provision of per call blocking capability at the originating end and of facilities that read and honor the privacy indicator at terminating end. Any blocking costs can be readily absorbed because the calling party number and privacy flag are integral elements of SS7. Moreover, we find that charging the caller for per call blocking beyond the costs of deploying SS7 would disrupt the balance that per call blocking establishes between the privacy interests of the caller and called party. Charging for per call blocking heightens the burden upon the caller to invoke privacy and does not appear to be necessary for the overall viability of the service.

50. *Applicability to Additional Services.* In addition to calling party number delivery, SS7 technology permits delivery of calling party name via an optional parameter that is separate from the calling party number parameter.[29] We tentatively conclude that our policies for calling party number delivery should apply equally to services delivering calling

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[29] State public utility commissions in Texas and Minnesota have approved calling party name and number delivery services. *See* National Association of Regulatory Utilities Commissioners Bulletin, May 24, 1993 and July 26, 1993.

party name, and we seek comment on this tentative conclusion. Commenters should address any differences that may exist in the privacy considerations that apply to calling party name delivery as opposed to calling party number delivery. Commenters should also address whether the policies for subscriber privacy should extend to other services, such as services that permit subscribers to automatically return calls or to selectively forward calls.

F. ANI and Caller Privacy.

51. In the NPRM the Commission noted that interstate ANI, or its SS7 equivalent "charge number" parameter, already identifies the billing number of a call to interstate subscribers of ANI service, and is used by the LECs and IXCs for billing purposes. IXCs, however, sometimes deliver ANI to 800 and 900 service subscribers via a dedicated line. The NPRM requested comment on whether there are privacy interests associated with the transmission of ANI to 800 and 900 service subscribers or information service providers, and if so, what approaches should be considered to address the issue. The Commission noted that one possible approach would be to require businesses to obtain the consent of the caller before revealing the caller's telephone number to any third party. In this order we adopt such an approach.[30]

52. The majority of commenters conclude that it is not technically feasible to block identification of ANI-based interstate calling number in the same way as SS7-based calling party number because it is the billing number that LECs must provide to IXCs. Allnet proposes that LECs be required

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[30] *Id.* at para. 29 and n. 49.

to provide a privacy indicator with ANI. AT&T notes that ANI or the SS7 equivalent "Charge Number" do not currently have a privacy indicator that would signal the terminating carrier to block the passing of the billing telephone number to the called party. AT&T concludes that blocking requirements adopted by the Commission should not extend to the delivery of ANI. Nynex notes that under its SS7 interconnection tariff, in those cases where the billing number and the CPN are the same, the calling party number parameter will provide the billing number and the charge number will not be sent. Nynex adds that, where there is a difference between the billing number and the calling party number, the charge number parameter will provide the billing number.

53. Citicorp contends that proposals to limit the use of ANI are contrary to the Communications Act's purpose of promoting new telecommunications technologies. Illinois CC states that ANI is needed to promote competition, and to restrict the use of ANI in any way would undermine this policy goal. Ad Hoc Users, ARINC, and Citicorp identify many beneficial uses of ANI transmission.[31] Ad Hoc Users

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[31] Ad Hoc Users states that such applications include giving immediate medical assistance data to technicians who have been called by patients with pacemakers, use of ANI by investment firms as a check against fraud, use of ANI to process orders for pay-per-view cable television, routing of callers to specialized agents or announcements, business to business automated ordering and ANI-based employee dispatching. ARINC states that many airlines use ANI via their 800 service reservations networks to provide better service to regular customers, to verify telephone billings, to route calls among reservation centers, to detect fraud and to identify threatening calls. Citicorp notes that ANI can be used for customized customer services, telephone banking and home shopping, saving unnecessary holding time, retrieval of a customer's prior transactions, service representative calling back when a customer is cut off, and triggering letters to poll customers to determine deficiencies of service.

adds that these significant benefits are unfairly characterized by NYS Law as a "plague of unsolicited marketing calls." It notes that prohibiting transmission of ANI would shut down existing ANI applications and would not allow new applications until SS7 interconnection of LECs with IXCs is almost ubiquitous.

54. IIA states that because the transmission of ANI cannot be blocked, the focus must shift from whether the called party receives it to how the recipient uses the data. It states that questions presented by use of ANI data are transitional and ANI subscribers can be expected to migrate to SS7-based caller ID. In the meantime, IIA proposes the Commission rely upon voluntary and industry initiated efforts to explain to consumers how information about them is gathered and used. NARUC argues that denying commercial ANI purchasers the information ANI provides will give carriers an incentive to expedite development of CPN based services. Baer, Colorado DVC, Consumer Action, Michigan PSC, and others suggest that if the Commission allows for either per line or per call blocking, then it should also restrict the availability of ANI exclusively to LECs and IXCs. NTIA recommends that the Commission direct interested carriers and manufacturers to report on the modifications needed to implement caller blocking of ANI to the called party and formulate a plan for so modifying existing ANI over a period of years. Sprint concurs that ANI should be subject to privacy indicators, insofar as technology permits.

55. Unlike the privacy indicator that can be placed on the calling party number with respect to caller ID, the calling party cannot place a privacy flag on ANI or its SS7-based equivalent, the charge number parameter. Therefore, some parties suggest that the availability of ANI be restricted

exclusively to LECs and IXCs, and should not be passed on to 800 and 900 service subscribers for billing, routing, or other purposes.[32] Other commenters respond, however, that ANI is needed to sustain beneficial services currently offered.

56. We conclude that the public interest would be served by continuing to permit telephone companies to deliver ANI to 800, 900, and other business subscribers who pay for transmission of the call. ANI has been available to these end users without a privacy mechanism for several years and, as indicated above, has spurred a multitude of beneficial applications. While we are concerned that callers' reasonable expectation of privacy not be violated, we do not believe that the public would be served by terminating all access to ANI by subscribers to 800 and 900-type services. Ad Hoc Users points out that ANI service permits the receipt of calling numbers in real time but would not usually provide information beyond that which such subscribers will receive in any event on their telephone company bills because the called party pays for the call. It states that such realtime provision of ANI benefits calling parties by permitting a number of substantial customer service enhancements.

57. In weighing these various public interest concerns, we are aware that the continued deployment of SS7 throughout the telephone networks makes available a blockable alternative to ANI.[33] However, where the called party pays for the interstate call (*e.g.*, 800 and 900 service subscribers), the situation is somewhat analogous to a collect call regarding

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[32] *E.g.*, Baer, Colorado DVC, Consumer Action, Michigan PSC.

[33] In an SS7 environment, if the calling party number and the charge number of a telephone subscriber are identical, the CPN and its associated privacy indicator may be used for billing purposes. *See* Nynex at 5, n. 3.

expectations of confidentiality by the calling party. We believe the best approach is to require education by the carriers (see Section G, *infra*) and to restrict how 800 and 900-type service subscribers may use ANI data. Resale of the ANI number to create marketing lists or other information about callers without their consent has generated much of the opposition to the availability of ANI. Bills to restrict such practices have been introduced in Congress and commenters in this proceeding have addressed the implications of unrestricted availability of information about callers. Colorado DVC, NTIA, and others urge the Commission to prohibit the resale or use of ANI for uses other than call management, billing, or customer services employed directly by the subscriber to ANI end user services. To address these privacy concerns, we prohibit the reuse or sale of ANI information by 800, 900, and other service subscribers absent affirmative subscriber consent. We permit the use of ANI for call management and routing functions.[34]

58. Concerns also have been expressed regarding the use of ANI by 800 and 900-type service subscribers for solicitation. For example, ANI can be used to place return calls to telephone customers who previously have contacted an ANI 800 or 900-type services subscriber. In this regard, Nynex proposes that use of ANI be limited to performing and verifying transactions requested by the caller. ARINC, on the other hand, argues that such a restriction would diminish too severely the value of ANI for businesses and customers. We

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[34] *See* Appendix C, Section 64.1602. *See also* 47 C.F.R. Section 64.1504(c) (prohibits use of 800 service to provide information services unless the calling party has a "presubscription or comparable arrangement" with the information provider).

conclude that an ANI services subscriber may use ANI to offer products or services to an established customer that are directly related to products or services previously provided by the ANI services subscriber to that customer.[35] ANI services subscribers may also wish to compile ANI information in an aggregate form, either to improve operations or as a marketing tool. Our rules permit disclosure of ANI information in aggregate form if it is compiled in a manner which precludes identification of individual telephone subscribers.[36]

G. Subscriber Education, Further Notice of Proposed Rulemaking.

59. In the NPRM, the Commission stated that carriers offering calling party number, or facilitating transmission of interstate caller ID, should be required to inform callers of the availability of the service, including instructing callers how to implement any caller privacy mechanisms.[37] The Commission noted that no segment of the calling public can adequately control dissemination of the calling number under any regulatory structure if they are unaware that their calling number is being identified.[38] The majority of commenters agreed that

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[35] The Commission's rules implementing the Telephone Consumer Protection Act of 1991 (TCPA) prohibit calls by a telephone solicitor to residential telephone subscribers who have asked that they receive no solicitation calls from that person or entity. We emphasize that these rules apply where the telephone numbers of residential subscribers are obtained via caller ID, ANI or charge number services. See Section 64.1200 of the Commission's rules.

[36] *See* Section 64.1602, Appendix C.

[37] NPRM at para. 23.

[38] *Id.*

subscriber education is in the public interest and should be implemented with the introduction of interstate calling party number based services, including caller ID. Commenters also expressed concern over the education of callers whose numbers are identified via ANI-based services.

60. We affirm our tentative conclusion that deployment of interstate calling party number services should be accompanied by consumer education regarding the availability of identification services and how to invoke the privacy protection mechanism. The record indicates that consumer information is essential to public understanding of any privacy mechanisms associated with caller identification services. Accordingly, we amend our rules to require that carriers participating in the offering of services that deliver calling party number, including ANI or charge number, on interstate calls must notify their subscribers that their telephone numbers may be transmitted to a called party.[39] In addition, such carriers must inform their subscribers of the privacy mechanism available on interstate calls, and must explain how subscribers can activate the privacy mechanism. Even though the ability of the caller to activate a privacy flag is not yet ubiquitous on calls to ANI or charge number services subscribers, ANI or charge number services increasingly are offered through SS7 networks, and an education effort will be most effective if it anticipates the greater availability of a privacy flag. For ANI or charge number services for which such privacy is not provided, the notification must inform telephone customers of the restrictions on the reuse or sale of subscriber information. We specifically request further comment on whether we should prescribe detailed instructions

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[39] *See* Section 64.1603, Appendix C.

regarding what form education should take or prescribe more precisely responsibilities of various carriers.[40] We are particularly interested in specific joint industry education proposals (see comments of IIA, *supra,* para. 54).

H. CPNI and Subscriber Privacy.

61. Privacy issues are also raised by telephone companies' use of customer proprietary network information, or CPNI.[41] The Commission's current CPNI rules govern the BOCs' use of CPNI in marketing enhanced services and CPE.[42] The CPNI rules are designed to balance considerations of customer privacy, efficiency, and competitive equity. In recent months, however, the communications industry has

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[40] Pacific Bell has expressed concern in *ex parte* comments to Commission staff that subscriber education requirements imposed by the state of California as a condition to the introduction of intrastate calling party number based services, like caller ID, are so burdensome to preclude, as an economic matter, offering of caller ID services in California. The record in this proceeding is not sufficient to resolve this issue. Carriers may present issues of state regulation of interstate service to the Commission for consideration under the standards set forth in *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986). *See also* para. 70, *infra.*

[41] CPNI encompasses any information about customers' network services and their use of those services that a telephone company possesses by virtue of its provision of network services. *See* Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 215 (1988).

[42] *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7605-14 (1991) (enhanced services CPNI rules); Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143, 152-153 (1987) (CPE CPNI rules). These rules do not apply to independent LECs.

witnessed large local exchange carriers' planning and entering into alliances, acquisitions, and mergers with non-telephone company partners.[43] In this changing environment, access to CPNI among affiliated companies may heighten concerns. Thus, we will seek further comment from the public on whether the existing CPNI safeguards will adequately meet customers' reasonable privacy expectations in the future. The CPNI rules are currently under reconsideration in the Computer III Remand Proceeding, and the privacy concerns related to CPNI are more appropriately addressed in that proceeding. Therefore, we are releasing a public notice in CC Docket No. 90-623 seeking further comment, particularly on the issue of residential and small business customers' CPNI-related privacy concerns.

I. Wiretap Statutes and Caller ID.

62. In the NPRM, the Commission noted that some parties suggest that caller ID may violate the Federal Wiretap Act (Wiretap Act), 18 U.S.C. §§ 3121-3127 or the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2511.[44] Colorado DVC, DC OPC, NASUCA, and Ohio OCC reiterate this contention. Other commenters such as Allnet, Bell Atlantic, Ameritech, and AT&T argue that caller ID is permissible under ECPA or the consent provisions of the Wiretap Act as "trap and trace" devices. Pacific adds that caller ID is not the type of activity that Congress intended to include in ECPA.

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[43] *See, e.g.*, BellSouth's agreement in principle to acquire an interest in Prime Management Co.; US West's $2.5 billion investment in Time Warner Entertainment Co.; and NYNEX's agreement to invest $1.2 billion in Viacom.

[44] NPRM at paras. 24-26.

Pacific points out that trap and trace laws are designed to prevent surreptitious wiretaps by the police and other parties and caller ID is not such a wiretap because it is a tariffed service offered uniformly and publicly to all customers.

63. In accordance with its statement in the NPRM that it would solicit the views and analysis of the Department of Justice, the Commission's General Counsel requested the Department of Justice's opinion on the issue. In its reply memorandum, the Department of Justice (DOJ) concludes that the federal wiretap statutes embodied in the Federal Criminal Code do not pose a barrier to interstate caller ID service. We adopt the Department's analysis and conclusions on this issue, and are incorporating the Department's memorandum into this Report and Order. *See* Appendix D.

J. Relationship between Interstate and Intrastate Caller ID.

64. In the NPRM, the Commission sought comment on whether state policies concerning calling party number based services, including caller ID, negate or hinder the development of interstate caller ID, ANI, or both.[45] In analyzing whether interstate and intrastate models may coexist harmoniously both legally and technologically, the Commission did not propose to preempt any specific state regulation governing intrastate caller ID. Rather, we found that it is necessary to review existing state policies individually in order to determine whether preemption is necessary.[46] Many commenters,

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[45] NPRM at para. 34.

[46] *Id.* at para. 30.

including AT&T, GTE, and MCI, propose that the Commission use its authority to preempt the states if state regulations impede interstate caller ID offerings. Pacific concurs that the Commission may preempt state regulation of caller ID because the service is not separable into interstate and intrastate portions and state regulation frustrates a valid federal policy.

65. Some commenters, including Ameritech, Sprint, Bell Atlantic, and BellSouth, contend that the terminating carrier should be required to honor any blocking indicators that are present on interstate calls on a per call basis. BellSouth proposes that the Commission should defer to each state's determination of blocking options available for calls originating in that state. Some commenters, including Colorado DVC, Connecticut, and Consumer Action, concur that the Commission should defer to state policies on blocking because state regulators are more attuned to local factors including history, culture, custom and legal environment. State commenters, including Indiana Utility Counsel, Illinois CC, and Missouri PSC, contend that preemption is unwarranted and untimely because states should be able to develop standards that provide more, but not less privacy protection to consumers. NARUC argues that preempting state caller ID policies is inappropriate from both a legal and policy perspective. NARUC proposes that the Commission devise a plan that carries out federal objectives but can substantially coexist with various state blocking plans. Some commenters concur with NARUC and contend that federal and state rules can coexist.

66. Many commenters, including AT&T and Pacific, contend that existing technology renders it infeasible for carriers to comply with one set of blocking requirements for

intrastate and a different set of standards for interstate caller ID. Allnet, NTI, and Bell Atlantic contend that privacy standards should apply to intrastate, interstate and international communications and that different standards would require more complex equipment. Specifically, Bell Atlantic asserts that substantial development and expense over several years would be necessary to accommodate differing interstate and intrastate standards.

67. Nynex, USTA, and SNET contend that different state and federal policies on caller ID create caller confusion, and that a uniform national policy for caller ID would minimize consumer confusion. The California PUC proposes that the Commission, if it allows interstate caller ID, should not preempt more restrictive state privacy protections adopted for intrastate caller ID, and instead should defer to the more restrictive requirements in each of the states.

68. As is discussed in Section A, *supra*, interstate passage of calling party number serves the public interest by making it possible for telecommunications service providers to offer beneficial new communications services that directly and indirectly can increase the business sector's efficiency and residential customers' access to information and other services. In this proceeding we will require carriers having SS7 capability to transmit CPN to interconnecting carriers. Recognizing that there may be situations in which the calling party wishes to preserve privacy, we establish *67 (and 1167 for rotary or pulse-dialing phones) as the mechanism by which this may be done on interstate calls. Carriers must honor a caller's choice to use this blocking mechanism. These policies strike a reasonable balance among significant competing interests, including reasonable privacy expectations and economic growth. Our approach ensures that the privacy

rights of the caller are not unreasonably infringed upon by the policies of the state where the call terminates (in those states offering unlimited caller ID a blocking request from another state might not otherwise be honored) nor are the concerns of the called party unreasonably infringed upon by the policies of the state where the call originates (unqualified, free per line blocking likely would significantly increase the number of blocked interstate calls).

69. We are sensitive to states' interests in protecting the privacy of their residents, but note that limited preemption of state regulations is necessary in some instances to ensure that our goal of facilitating the development of interstate calling party number based services is not frustrated by inconsistent state law, and that state decisions with respect to caller ID or other calling party number based services do not infringe upon the privacy interests of parties in other states.[47] Accordingly, we preempt state regulation of caller ID or other calling party number based services as follows: states may not prohibit automatic per call blocking for interstate calls, require a blocking alternative for interstate calls different from the one adopted in this proceeding, or prohibit the offering of interstate caller ID services. Thus, states may not prohibit carriers from offering interstate services based on calling party number, including caller ID service. States will not be able to

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[47] *See City of New York v. FCC*, 486 U.S. 57 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). We conclude that the fact that the federal wiretap statutes do not, as a matter of federal criminal law policy, preempt states from adopting greater privacy protection measures, *see United States v. Capra*, 501 F.2d 267, 276 (2d Cir. 1974), *cert. denied*, 402 U.S. 990 (1975); S. Rep. No. 1097, 90th Cong., 2d Sess. 93 (1968), does not affect our authority to preempt as a matter of federal communications policy.

require the use of digits other than *67 (or 1167 for rotary or pulse-dialing phones) for automatic per call blocking on interstate calls, nor require carriers offering or participating in the interstate transmission of calling party number to provide blocking systems that interfere with the use of *67 (or 1167 for rotary or pulse-dialing phones) to achieve blocking. Preemption is necessary in these cases to ensure that state regulations do not interfere with the achievement of important federal objectives, and with the Commission's exclusive jurisdiction over interstate communications.[48]

70. To the extent that inconsistent regulations cannot be accommodated simultaneously for interstate and intrastate caller ID services, some further preemption of state regulations may become necessary.[49] We will examine the need for such additional preemption on a case-by-case basis. For example, there may be cases in which state caller ID requirements applicable to intrastate calls would, as a practical matter, make it impossible for carriers to implement per call blocking for interstate calls. We are reluctant to preempt state authority over intrastate communications, and will endeavor to accommodate state regulations whenever possible. State policies, however, must not frustrate the paramount federal interest in a cohesive interstate communications policy, and must not be allowed to infringe unreasonably upon the privacy interests of the citizens of other states.

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[48] We note that the Department of Justice memorandum, which also addresses preemption issues, is consistent with our analysis of preemption. *See* Appendix D at 9-13.

[49] *See generally, Louisiana Public Service Comm'n v. FCC; NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989). *See also* para. 60, n. 38, *supra.*

III. CONCLUSION

71. Our goal in this proceeding is to establish a federal policy to govern the passage of calling party number among carrier networks. In this order we find that a federal model for interstate delivery of calling party number is in the public interest, that the model must protect calling party privacy, and that certain state regulations of interstate caller ID must be preempted. Accordingly, we amend Part 64 of the rules to require that common carriers using Common Channel Signalling System 7 (SS7) and subscribing to or offering any service based on SS7 functionality must transmit CPN and its associated privacy indicator on interstate calls. We require that carriers offering CPN based services provide automatic per call blocking at no charge to interstate callers, and that the privacy indicator be honored by terminating carriers. We find that the costs of interstate transmission of CPN are *de minimis*, and that the CPN should be transmitted among carriers without additional charge. We require that carriers participating in the offering of any service that delivers CPN on interstate calls must inform telephone subscribers regarding the availability of identification services and how to invoke the privacy protection mechanism. We also seek comment on whether more specific subscriber education requirements should be imposed. We restrict the reuse or sale of telephone numbers by subscribers to automatic number identification (ANI) or charge number services. We note that additional comments are sought in the *Computer III* Remand Proceeding on whether residential and small business customers' privacy concerns warrant revision of the Commission's rules governing reuse and sale of customer proprietary network information (CPNI). Finally, we seek comment on extending the

policies adopted herein to other services that might identify the calling party.

72. We expect the rules and policies adopted herein will support the efforts of carriers, standards setting bodies, states, CPE manufacturers, and others in providing CPN-dependent services in an efficient manner. In this federal model, we recognize the value and benefits to the public of interstate CPN services, we promote the transmission of the calling party number from the originating carrier to the terminating carrier, and we balance the reasonable privacy expectations of both the calling and the called party. The rules we adopt to govern services such as interstate caller ID service remove obstacles to their development posed by uncertainty and non-uniform state policies and should facilitate implementation of new and beneficial interstate services.

IV. PROCEDURAL MATTERS

73. *Ex Parte Rules – Non-Restricted Proceeding.* The Further Notice of Proposed Rulemaking is a nonrestricted notice and comment rulemaking proceeding. *Ex Parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

74. *Final Regulatory Flexibility Analysis:* Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.*, the following final analysis has been prepared:

I. Need for and objective of the rules:

This Report and Order adopts policies governing the transmission of the calling party number parameter and its associated privacy indicator on interstate calls. Several commenters to the NPRM in this proceeding have identified a number of potential uses for interstate calling party number based services, including caller ID, and have indicated that it also will improve certain existing communication service offerings. We find that the potential benefits of interstate passage of calling party number far exceed any negative effects. We thus adopt the conclusion reached in the NPRM that interstate caller ID and other calling party number based services are in the public interest and should be available to interstate subscribers nationwide pursuant to the policies and rules set forth in this order.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

III. Significant alternatives considered:

The NPRM in this proceeding requested comments on several proposals as well as the views of commenters on other possibilities. The Commission has considered all comments and has proposed regulations which require the passage of calling party number where SS7 is deployed, facilitate interstate calling party number based services, including caller ID, and implement federal policy on privacy.

75. *Initial Regulatory Flexibility Act Analysis on the Further Notice of Proposed Rulemaking*

An Initial Regulatory Flexibility Analysis is contained Appendix A to this Report and Order and Further Notice of Proposed Rulemaking.

76. *Comment Dates*

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before May 18, 1994 and reply comments on or before June 21, 1994. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting documents with the reference number "CC Docket 91-281" on each document. If interested parties want each Commissioner to receive a personal copy of comments, interested parties must file an original plus nine copies. Interested parties should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, DC. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, DC 20037, (202) 857-3800.

V. ORDERING CLAUSES

77. Accordingly, It Is Ordered, that, pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205 and 218, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, and 218, Part 64 of the Commission's Rules and Regulations ARE AMENDED as set forth in Appendix C hereof, effective April 12, 1995.

78. It Is Further Ordered, that, pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205 and 218, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, and 218, Further NOTICE OF PROPOSED RULEMAKING is hereby provided as indicated above.

79. It Is Further Ordered, that, the Secretary shall cause a summary of this *Report and Order and Further Notice of Proposed Rulemaking* to be published in the Federal Register which shall include a statement describing how members of the public may obtain the complete text of this Commission decision. The Secretary shall also provide a copy of this *Report and Order Further Notice of Proposed Rulemaking* to each state utility commission.

80. For further information regarding this Report and Order and Further Notice of Proposed Rulemaking, contact Suzanne Hutchings, Common Carrier Bureau, Domestic Facilities Division, (202) 634-1802.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

Acting Secretary

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Rules and Polices Regarding Calling Number Identification Service – Caller ID (CC Docket No. 91-281)

In this *Report and Order*, the Commission finds that a federal model for interstate delivery of a calling party number (CPN) is in the public interest, that calling party privacy must be protected, and that certain state regulation of interstate caller ID must be preempted. Accordingly, the Commission amends its rules to require that: (1) common carriers using Signalling System 7 (SS7) and subscribing to or offering any service based on SS7 functionality must transmit the CPN and its associated privacy indicator on an interstate call to connecting carriers; (2) carriers offering CPN delivery services provide, at no charge to the caller, and automatic per-call blocking mechanism, *67, for interstate callers; (3) terminating carriers providing CPN delivery services, including caller ID, must honor the *67 privacy indicator; and (4) carriers participating in services that deliver CPN on interstate calls must inform telephone subscribers that the CPN may be revealed to called parties and educate customers about how to obtain privacy. The Commission also adopts rules to address privacy concerns raised by the reuse or sale of information generated by automatic number identification (ANI), and seeks additional comment on whether the privacy concerns by residential and small business customers warrant revising the Commission's rules governing the reuse and sale of customer proprietary network information (CPNI). Finally, the Commission adopts a *Further Notice of Proposed Rulemaking* to solicit comment on (1)

whether the Commission should prescribe more precise educational requirements, and (2) whether and how the policies adopted on caller ID should be extended to other identification services, such as caller party name or CPNI.

I support this action because I believe that it balances the primary public policy considerations in this proceeding regarding how to facilitate the interstate transmission of CPN through services including caller ID while offering individuals an opportunity to protect their privacy. I write separately on this issue to underscore that the Commission must monitor the extent that the implementation of these rules effectively mitigates the confusion created by the varying state practices regarding the transmission of CPN and associated blocking procedures for intrastate calls. Admittedly, the Commission's actions will not explicitly preempt states on intrastate practices, but I am concerned that the combination of the federal policy for interstate calls and various intrastate practices may require some education for consumers. Accordingly, I believe that the *Further Notice* is an appropriate step toward prescribing more precise educational requirements, if necessary.

I also am interested in how states will resolve situations where: (1) states currently lack privacy capability, and will have to provide some equipment; and (2) states currently use per-line blocking for intrastate calls and will have to accommodate *67 blocking capability. I believe that the federal policy adopted today by the Commission is a minimally intrusive measure given the variety of state practices, and may manage the level of confusion for consumers most effectively compared to alternative approaches. Nonetheless, I will be interested in reviewing the practical effect of these rules.

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION, SECOND REPORT AND ORDER AND THIRD NOTICE OF PROPOSED RULEMAKING, 10 FCC RCD 11700 (1995)

Before the
FEDERAL COMMUNICATIONS COMMISSION
FCC 95-187
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Regarding Calling Number Identification Service – Caller ID	)	**CC Docket No. 91-281**
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION, SECOND REPORT AND ORDER AND THIRD NOTICE OF PROPOSED RULEMAKING

10 FCC Rcd 11700

Adopted: May 4, 1995 Released: May 5, 1995

Comment Date: June 30, 1995
Reply Comment Date: July 28, 1995

By the Commission: Commissioner Barrett issuing a statement.

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I. INTRODUCTION

1. In this proceeding, we address petitions for reconsideration of our decision in Rules and Policies regarding Calling Number Identification Service – Caller ID.[1] We also address comments filed in response to the Further Notice of Proposed Rulemaking in the same docket.[2] Finally, we issue a

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[1] *Rules and Policies Regarding Calling Number Identification Service – Caller ID,* Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 1764 (1994) (hereinafter referred to as Report and Order or Order).

[2] *Id.*

Third Notice of Proposed Rulemaking to resolve issues raised by Private Branch Exchange (PBX) telephone systems and private payphones.

2. In the *Report and Order*, the Commission found that passage over interstate facilities of the number of the telephone from which a party called made possible a wide range of services and, thus, promoting development of such services is consistent with the Commission's responsibilities under Sections 1 and 7 of the Communications Act. Specifically, the Commission found passage of the calling party's number, or CPN, could bring consumers rapid and efficient service and encourage the introduction of new technologies and services to the public.[3] In particular, the Commission found that CPN could enable service providers and consumers to conduct transactions more efficiently. The *Report and Order* offered some examples to illustrate how this would be achieved: computer services could recognize the calling party's number and either permit, or deny, access. Stockbrokers, travel agents, parts and equipment providers, and booksellers could route a call to a preprogrammed location closer to the calling party to expedite deliveries or services. Retailers could verify credit and billing information instantaneously. Customized services that depend on the caller's individualized preferences could be developed. The Commission observed that even small efficiencies on individual transactions become significant in an economy that averages more than one billion interstate calling minutes a day. These savings could lower service costs for suppliers, leading to lower prices for consumers.[4]

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[3] *Id.* at para. 9.

[4] *Id.* at paras. 8-9.

3. The Commission identified other potential benefits, and beneficiaries, from passage of CPN over interstate facilities. These included the carriers with networks able to pass CPN, which benefit from greater use of their networks as new services are developed and as existing services become more attractive to suppliers and consumers. Carriers lacking the ability to pass CPN have incentives to install it to remain competitive with carriers having it. Entrepreneurs and employees benefit from new business and employment opportunities. None of these benefits – efficiency and productivity gains, infrastructure development and network utilization, or new service and employment opportunities – are possible unless CPN is passed among carrier networks.

4. For all these reasons the *Report and Order* established federal policies to govern the passage of the calling party number over interstate facilities. The Commission found the establishment of federal policies necessary because uncertainty created by their absence appeared to be impeding the development of potentially valuable interstate services, like those described in the preceding paragraphs. The two areas of greatest uncertainty identified by the Commission were (1) compensation issues related to passage of CPN for interstate calls and (2) varying state requirements intended to protect the privacy rights of calling and called parties on interstate calls.[5] In addition, concern that lack of federal policy and varying state policies created customer confusion influenced our decision to act.

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[5] *Rules and Policies Regarding Calling Number Identification Service*, Notice of Proposed Rulemaking, 6 FCC Rcd 6752, 6754 (1991) at para. 11 (hereinafter NPRM); Report and Order at para. 11.

5. As is explained below, we affirm our finding that common carriers, including Commercial Mobile Radio Service providers, with Signaling System 7 (SS7) call set up capability, must transport CPN on interstate calls without charge to interconnecting carriers. We clarify that we do not require carriers that do not have SS7 call set up capability to make the SS7 investments that would enable them to pass CPN. We modify our prior decision that carriers only provide privacy when a caller first dials *67. Specifically, we permit carriers to provide privacy on all calls dialed from a particular line where state policies provide, and the customer selects, that option, provided carriers permit callers to unblock calls from that line by dialing *82. Federal policy prohibits default per line blocking. Where state policies do not require or permit at the customer's election per line blocking, carriers are bound by the federal privacy protection model to provide privacy only where *67 is dialed. We require that hotel and motel lines comply with these policies as of the effective date of the new rules, December 1, 1995, while public payphones and partylines must comply with these policies by January 1, 1997. Additionally, we continue to exempt calls to emergency lines from our rules; that is, a carrier's obligation to honor caller privacy requests will be governed by state policies. We affirm our existing policies governing use of Automatic Number Identification, or ANI.[6]

6. Furthermore, we require that when a caller requests that the name of the subscriber to the line from which he is calling be concealed, a carrier may not reveal that name to the called party. With respect to other services that use CPN and might identify the calling party, we require that when a caller

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[6] *See infra* paras. 17-18.

requests privacy, a carrier may not reveal that caller's number or name, nor may the carrier use the number or name to allow the called party to contact the calling party. We continue to require that carriers with call set up capability that pass CPN or transmit ANI educate customers regarding how customers can control the passage of CPN and ANI to the party they are calling. Additionally, we issue a Notice of Proposed Rulemaking proposing (1) that PBX systems capable of delivering CPN to the public switched telephone network also be capable of delivering a privacy indicator when the user of a telephone served by the PBX dials *67 and be capable of unblocking the line by dialing *82 and (2) that private payphones be subject to our caller ID rules. Finally, we extend the date of December 1, 1995 by which carriers with SS7 call set up capability must comply with our rules relating to passage of CPN associated with interstate calls.[7]

II. BACKGROUND

A. Technology Advances Underlying CPN-Based Services

7. Historically, signaling information that enabled call routing and billing was transmitted through multifrequency in-band signaling on the same circuits used to connect the

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[7] On March 17, 1995 the Commission released an Order, *Rules and Policies Regarding Calling Number Identification Service – Caller ID*, CC Docket No. 91-281, Order, FCC 95-119 (released March 17, 1995), staying the April 12, 1995 effective date of Sections 64.1601 and 64.1603 which had been established in the Report and Order.

calling and called parties.[8] Beginning in the 1980s, carriers worldwide began abandoning multifrequency in-band signaling in favor of out-of-band signaling. With out-of-band signaling, a packet network transmits signaling information on circuits separate from the circuits used to connect the calling and called parties. When compared to multifrequency in-band signaling, out-of-band signaling allows carriers to use their networks more efficiently. Efficiency gains are realized since carriers can set up and release calls more quickly. This increases the ratio of the time interoffice circuits are in use carrying a conversation to the time interoffice circuits are in the process of being connected or disconnected. Additionally, out-of-band signaling enhances flexibility in call handling and processing. It also avoids certain kinds of fraud that could be used with multifrequency signaling to defeat billing systems. The latest version of out-of-band signaling, deployed in carrier networks throughout the world, is Signaling System Seven, or SS7. A SS7 message conveys information presented in digital format to switches and other network elements. The message is organized into an agreed format that consists of parameter fields and subfields.

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[8] When a switch uses multifrequency signaling to establish a circuit connecting it to another switch, it outpulses sequences of tones representing the call set up information on the same circuit that is used to connect the calling and called parties. On all interoffice calls, the switch outpulses the address sequence, which contains the called party number. Depending on the circumstances, the switch may also outpulse the OZZ sequence and the ANI sequence. The OZZ sequence identifies the interexchange carrier and provides information about the call that is used to select the proper circuit. The ANI sequence contains the billing number for the party making the call and identifies the type of line (*e.g.*, POTS line, Coin Line, Hotel/Motel line) used to place the call.

8. The Commission addressed issues in the Report and Order that are raised by the presence of the CPN parameter field in a SS7 call set up message. CPN is an optional parameter of the "initial address message" or IAM,[9] an SS7 ISUP[10] message, which is included in most calls. The IAM is a collection of information critical to call routing and handling. Industry standards bodies strictly control the information that can be included in the IAM.

9. With multifrequency signaling, signaling information capable of identifying the calling party generally was not passed beyond the interexchange carrier (IXC), which used the information primarily for billing purposes. SS7, however, makes information identifying the calling party available to the terminating carrier. By making minor modifications to an individual's line, a terminating carrier is able to provide the calling party's number to a called individual between the first and second ring of the telephone. The individual merely needs to install a device (which may be incorporated into his or her telephone) to reveal the calling party's telephone number. This service to an individual receiving the calling party's number is often called Caller Identification Service or "caller ID."

10. The SS7 protocol anticipates that there may be occasions when the calling party does not wish to have the

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[9] The Initial Address Message (IAM) is contained in the ISDN User Part (ISUP) of the SS7 protocol. An IAM is the first SS7 message a switch transmits to begin establishing a circuit connection.

[10] ISDN User Part (ISUP) is a term defined by international standards bodies to describe a part of the SS7 protocol. The ISUP protocol defines the functions and signaling information to set up and release (*i.e.* disconnect) calls over circuit-switched connections.

CPN revealed to the called party. If a calling party dials *67 (or 1167 on a rotary phone), the switch recognizes this as a request for privacy and sets a privacy indicator within the SS7 message that will be used to set up the call. When a terminating switch receives an SS7 message with privacy requested, it will not pass the calling party number to the called party. Instead, the called party would receive a message that privacy has been requested.

11. Privacy may be achieved in ways other than by dialing *67. For example, carriers can modify a calling party's line so that the CPN on all calls from that line will be concealed, without the need for the calling party to dial *67. In addition, certain customer premises equipment may be used to dial *67 automatically on all outgoing calls.

B. Policies Adopted in the Report and Order

i. Passage of CPN

12. In the *Report and Order*, the Commission found that nearly all of the Bell Operating Companies now offer CPN as a nonchargeable option in their SS7 access tariffs. The American National Standard for Telecommunications – Signaling System Number 7 (SS7) – Integrated Services Digital Network, referred to as ANSI T1.113, 1988, includes CPN as an optional parameter of a SS7 network. Because CPN is an intrinsic part of SS7 call set up, and no cost is associated with "filling" the CPN parameter of the SS7 message, the Commission found the cost to transmit CPN for carriers having call set up capability is *de minimis*. The Commission concluded that carriers capable of transmitting call set up information should transmit CPN on interstate calls to interconnecting carriers without charge to those carriers. The Commission

believed this decision would resolve billing issues between local exchange and interexchange carriers that seemed to be preventing the passage of CPN on interstate calls.

ii. Privacy

13. The Commission recognized that passage of CPN could invade the privacy of calling parties wishing to remain anonymous. While the Commission recognized the privacy right of the called party to know who is calling, it found that the federal model governing passage of CPN should also offer the calling party a means of remaining anonymous. To craft a federal policy governing passage of CPN on interstate calls that protected the reasonable privacy expectations of both the calling and the called parties, the Commission looked at the rules adopted by state policy makers to protect the privacy of calling and called parties on intrastate calls and the rationales underlying the states' decisions.

14. The Commission found that states have not adopted a uniform policy in regulating intrastate CPN services such as caller ID. Some states do not require carriers to offer calling parties the ability to conceal their number, apparently believing that the called party's right to know who is calling is paramount. Some states require carriers to allow callers to invoke privacy by dialing *67. Some states not only require this, but also require carriers to offer at least some customers the option of blocking passage of CPN for all their calls, a service called "line blocking." States requiring carriers to offer line blocking differ in their definition of the subscribers to whom the carriers must offer this option. Some allow any subscriber to receive line blocking. Some limit its availability to groups with "special needs," such as law enforcement

agencies or abuse shelters. Some permit carriers to charge for line blocking, or only permit charges to specific categories of subscribers electing line blocking, such as persons who do not have an unlisted number. In some local networks, dialing *67 on a line that has been blocked by the carrier has the effect of unblocking the call, while in other networks, dialing *82 is necessary to unblock a line.[11] Some states prohibit blocking passage of CPN from payphones, but some require it, at least for certain payphones likely to be used by persons who are abused. Because states also revise their policies periodically, patterns different from those we have just described are also possible.

15. The Commission concluded that interstate callers should have a simple, uniform way of being assured privacy on an interstate call.[12] The Commission concluded that when interstate callers dial *67, their CPN should not be revealed to the called party. If they do not dial *67, interstate callers would then know that their number may be revealed to a called party equipped to receive CPN. The Commission found this to be a simple, uniform interstate policy that reasonably balances the privacy interests of calling and called parties. Carrier were prohibited from charging calling parties for providing this blocking capability and were ordered to educate consumers regarding how they can prevent their CPN from being revealed.

16. The Commission recognized that states' individual policies may, in some instances, be inconsistent with this federal model. The Commission therefore preempted state

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[11] Report and Order at para. 47; para. 53, *infra.*

[12] Report and Order at paras. 34 and 47.

regulation of services based on CPN, such as caller ID that: 1) prohibits the offering of interstate CPN-based services; 2) requires blocking alternatives on interstate calls different from those adopted by the Commission; or 3) requires blocking systems that interfere with the use of *67 to achieve blocking on interstate calls.[13]

iii. ANI Services

17. In the *Report and Order*, the Commission addressed issues raised by services that use ANI, which pass the telephone number to which a call is to be billed. Prior to the deployment of SS7, carriers would use multifrequency signaling to transmit ANI to IXCs. ANI's original purpose was to enable carriers to bill customers for calls they made. ANI, however, can also facilitate many of the services made possible by CPN because ANI identifies the calling party's billing number, which often, but not always, is the same as CPN.[14] Ordinarily, the IXC would not reveal ANI to the terminating local exchange carrier (LEC) or to called parties that the IXC served directly. As IXCs recognized its value to businesses for identifying customers, the carriers began offering ANI to those customers they served directly who were paying for the call, such as, subscribers to 800 service. Unlike CPN, carriers can not block delivery of ANI over multifrequency signaling networks. In SS7 networks, however, the charge number, which is equivalent to ANI in multifrequency networks, and the calling party number occupy different fields. Thus, the

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[13] *Id.* at para. 69.

[14] Typically, CPN and ANI are the same for residence telephone lines, while often in the case of business lines CPN and ANI are different.

SS7 protocol does permit the terminating carrier having call set up capability to know when the calling party wants privacy, because the CPN parameter field will indicate whether privacy is requested.

18. The Commission decided not to prohibit carriers from sharing ANI information with 800 service customers, even where a calling party requested privacy for his CPN.[15] It noted consumers' major concern about ANI services was reuse of the calling party information by 800 service customers. Accordingly, the Commission ruled that customer information gained from ANI services could not be reused or sold without the affirmative consent of the calling party. The only exception was that the information could be used to offer products or services to established customers where the products or services are directly related to products or services previously provided. Carriers providing ANI services are required to include these restrictions in tariffs or contracts that offer the services.

C. Matters Raised in the Further Notice of Proposed Rulemaking

i. Other CPN-Based Services

19. In the *Further Notice*, the Commission asked commenters to respond to the tentative conclusion that policies governing CPN delivery should also apply to services delivering calling party name. It also asked whether the policies

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[15] Report and Order at paras. 57-58.

should be applied to other services, such as automatic call return or selective call forwarding.[16]

20. Calling party name delivery provides the name of the customer in whose name the calling line is listed. When a called party subscribes to calling name service, the customer name associated with the calling line is delivered to the subscriber in the same manner as calling number. A subscriber's customer premise equipment (CPE) then displays the name associated with the calling line. To the end user customer, calling name and number services appear to work in a very similar manner.[17] From a network perspective, however, calling name delivery requires capabilities in addition to those used for calling number delivery. When a terminating switching office receives a call, it uses the CPN from the incoming call to determine the name associated with the calling line by accessing a remote data base through a TCAP[18] query or in limited cases by accessing a data base resident in the switch. As in the case of calling number, the switch then delivers the calling name to the called party during the ringing cycle.

21. Call return service allows a called party to return a call to a calling party by entering a feature code on the phone

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[16] *Id.* at para. 50.

[17] Calling name may be delivered by itself or with calling number depending on the carrier's service offerings and the customer's service selections.

[18] "TCAP" or Transactional Capabilities Application Part is also part of the SS7 protocol. The TCAP protocol defines the functions and signaling information supporting the exchange of information for non-circuit-related applications. For example, in 800 data base service, a switch uses a TCAP message to query a data base to determine routing information based on the 800 number the calling party has dialed.

(*e.g.* *69). For the service to function between switching offices, CPN must be present in the IAM and TCAP message capability must exist. When a customer invokes call return, the serving switching office will examine the contents of the incoming call memory slot[19] to determine the CPN of the last incoming call. If CPN is not in the memory slot, the customer receives a message that the call could not be returned. If CPN is in the memory slot, the serving switch launches a TCAP message to determine the status of the original calling party's line. If the line is idle, the serving switch will set up a call and notify the customer invoking the call return service that the call is being completed. At that point, call processing proceeds as though it were a normal call. Call return service goes by many different names (*e.g.*, Last Call Return, Auto Call Return, Return Call), but the basic operation of the service is the same.

22. There are numerous other CPN-based services such as Selective Call Rejection and Selective Call Forwarding. Commenters have suggested many other creative ways in which CPN may be used to develop new services.

ii. Education

23. In the *Report and Order,* the Commission recognized that subscriber education is in the public interest and should be implemented with the introduction of interstate

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[19] An incoming call memory slot is associated with each subscriber line. Incoming call memory slots reside in a switch's memory and contain information regarding the last incoming call for a particular line. This information may include the CPN of the last incoming call.

CPN-based services.[20] The Commission also noted commenters' concern that callers be told that their billing numbers are identified via ANI-based services.[21] Accordingly, the Commission concluded that carriers participating in the offering of services that deliver calling party number, including ANI or charge number, on interstate calls must tell their subscribers that their telephone numbers may be transmitted to a called party.[22] In the *Further Notice*, the Commission asked whether it should prescribe in detail the form this education should take or whether it should prescribe precisely the responsibilities of the various carriers transmitting the information.[23]

III. MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

A. Transmission of CPN

i. Interstate CPN Transmission Costs

24. *Background.* In the *Report and Order*, the Commission affirmed its tentative finding that the unimpeded flow of CPN throughout the network fosters fullest development of CPN-based services.[24] It concluded that the cost to carriers of transmitting CPN on interstate calls is *de minimis* for access services using SS7 technology because SS7 standards include

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[20] Report and Order at para. 59.

[21] *Id.*

[22] *Id.* at para. 60.

[23] *Id.*

[24] *Id.* at para. 23.

CPN as an optional parameter for call set up.[25] Since carriers equipped with call set up capability do not need to make additional investments to be able to pass CPN, delivery of CPN would thus cause little incremental cost to carriers not currently recovered through tariffed offerings. The Commission amended its rules to require that not later than April 12, 1995, common carriers using SS7 and subscribing to or offering any service based on SS7 functionality transmit, without charge, the CPN parameter and the associated privacy indicator to connecting carriers on an interstate call.[26]

25. *Positions of the Parties.* Several IXCs petition the Commission to reconsider its decision to require carriers to transmit CPN without compensation from connecting carriers.[27] They argue that such a requirement: violates the Fifth Amendment because it unjustly deprives carriers of compensation for services;[28] is inconsistent with the Communications Act because it unlawfully precludes IXCs from filing tariffs that establish rates for the delivery of interstate CPN to terminating LECs;[29] and unfairly gives LECs a monopoly windfall because IXCs do not have the same opportunity as LECs to market CPN-based services.[30] Basic equity and fairness, they say, require that IXCs be able to charge for the delivery of CPN.[31] Sprint claims that while LECs correctly

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[25] *Id.*

[26] *Id.* at paras. 3 and 17; *see* note 7, *supra.*

[27] *See, e.g.,* AT&T Petition at 1-14; MCI Petition at 1-3; Sprint Petition at 1-13.

[28] *See, e.g.,* AT&T Petition at 10 n. 16.

[29] *See, e.g., Id.* at 8.

[30] *See, e.g., Id.* at 11; MCI Petition at 2.

[31] *See, e.g.,* MCI Petition at 3.

point out that IXCs do have direct access to customers on the terminating end for 800-type service and can provide caller ID type services to such customers, IXCs can do so only if the customer has a dedicated access arrangement.[32] MCI disputes the LEC claims that IXCs can simply raise their rates for existing services to recover CPN delivery costs.[33] Unlike the LECs, it says, IXCs operate in a competitive environment where prices are determined by marketplace forces. Accordingly, it says, rates for one service cannot be easily raised to recover the cost for another.

26. AT&T argues that the economic analysis underlying the Commission's "free passage" requirement arbitrarily ignores record evidence on IXC costs, is incomplete because it is based only upon a review of incremental costs, and is inconsistent with basic rules on cost allocation.[34] AT&T asserts that the Commission fails to take into account enormous expenditures that have been made by IXCs to develop and deploy SS7 technology to enable them to accept and deliver interstate CPN.[35] Furthermore, AT&T anticipates that fewer interstate calls will be completed once interstate caller ID is inaugurated, resulting in higher access costs for those calls actually completed. Ultimately, it says, the Commission's requiring free passage of CPN clashes with fundamental Commission policy favoring competition and will harm consumers by severely restricting IXCs' incentives to support

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[32] Sprint Reply at 4 n. 3; *see also* MCI Reply at 9-10.

[33] MCI Reply at 5.

[34] AT&T Petition at 3-8. AT&T estimated in an *Ex Parte* presentation that its annual interstate CPN delivery expense was $79.6 million dollars.

[35] *Id.* at 4-5.

feature-rich technology deployment in the future.[36] AT&T also argues that the "free passage" requirement precludes IXCs from filing tariffs that establish rates for the delivery of interstate CPN to terminating LECs. The Commission, it says, provided no notice that it was considering such a restriction.[37]

27. The LECs reject IXC arguments that free passage of CPN is unfair and gives LECs a monopoly windfall.[38] First, they say, the passage of CPN is not a service, nor is it dependent on IXC "property".[39] Instead, they argue, such passage is an aspect of fundamental common carriage – the delivery of the message as received from one carrier, unadulterated, through to the terminating carrier.[40] They say that IXCs have benefited from the LECs' free passage of CPN to them because the IXCs have been able to receive and use this information from the time carriers began to interconnect their SS7 networks several years ago.[41]

28. Bell Atlantic says that while it would not be impossible to set up a regulatory regime in which parties paid for bits of signaling information they received, doing so would not serve the public interest because it would delay service deployment and add to its cost.[42] LECs argue, that, in any

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[36] *See, e.g., Id.* at 3-11; MCI Petition at 3.

[37] AT&T Petition at 8 n. 13.

[38] *See, e.g.,* Bell Atlantic Comments at 2; BellSouth Comments at 7-8; GTE Comments at 9-15.

[39] 39 *See, e.g.,* US West Comments at 15.

[40] *See* US WEST Comments at 15; BellSouth Comments at 7 (IXCs must incur greater cost *not* to deliver CPN).

[41] *See, e.g.,* Bell Atlantic Comments at 3; *see also* Pacific Comments at 12.

[42] See Bell Atlantic Comments at 3; *see also* GTE Comments at 9.

event, any IXC charges to terminating LECs would be offset by the originating LEC charges to IXCs, thus eliminating any economic rationale for these charges.[43]

29. LECs further argue that IXCs offer their customers services that use, deliver, or operate on ANI – another form of calling number identification – and that nothing in the Commission's decision precludes them from developing additional end user services based on the CPN parameter of the SS7 protocol.[44] BellSouth claims, in fact, that ANI delivery services offered to end users by IXCs may compete directly with interstate end user calling number delivery services offered by the LECs. Thus, BellSouth claims that IXCs therefore have an incentive to charge LECs for CPN to increase LEC costs.[45] SWBT argues that if IXCs believe they are not recovering enough for transmitting CPN, they should raise rates to their own customers.[46]

30. *Discussion.* For the reasons set forth below, we affirm our decision that carriers must pass CPN to connecting carriers on interstate calls without charge.

31. Throughout this proceeding, commenters have overwhelmingly supported the conclusion that ubiquitous availability of CPN is in the public interest.[47] As many parties recognize, interstate CPN is the foundation for many new

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[43] *See, e.g.*, SWBT Comments at 6; *but see* GTE Comments at 10.

[44] *See, e.g.*, BellSouth Comments at 5-6. ANI is discussed at paras. 17-18, *supra*.

[45] BellSouth Comments at 6; *see also* GTE Comments at 15. *But see* Sprint Reply at 4 n. 3.

[46] SWBT Comments at 7.

[47] *See, e.g.*, Ad Hoc Petition at 8.

telecommunications products and services that will benefit the American public in many ways.[48] We adopted a federal policy on this matter because we found that uncertainty about carrier responsibilities was impeding the development of interstate services.[49]

32. Widespread SS7 deployment supports nationwide availability of CPN. SS7 makes possible during call set up, transmission of CPN as part of the initial address message. The SS7 protocol anticipates passage of CPN where call set up capability exists.

33. The basis for our conclusion that CPN should be passed from carrier to carrier at no charge is that CPN is an intrinsic part of SS7 call set up and that the costs for transporting the CPN parameter for carriers equipped with call set up capability are *de minimis*. Several IXCs dispute this and urge us not to require them to pass CPN, but instead allow them to pass this information selectively to terminating LECs who either agree to pay for the CPN or enter into some other reciprocal business arrangements with these IXCs. We find their arguments are not persuasive.

34. First, IXCs cannot reasonably claim that free passage of CPN to connecting carriers denies them recovery of their SS7 deployment costs.[50] The Commission has clearly stated that SS7 deployment represents a general network upgrade, the core costs of which should be borne by all

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[48] *See* paras. 2-3, *supra*. Specific examples of such services being marketed by carriers today include Call Return, Priority Ringing, Selective Call Forwarding and Calling Name.

[49] Report and Order at para. 23.

[50] *See* AT&T Petition at 5-6.

network users.[51] There is no evidence that IXC SS7 costs are not being recovered from the general body of network users. IXCs and LECs will therefore continue to recover their SS7 deployment costs through these charges, as well as through CPN-based services that they offer to their end users.[52] IXCs also can recover their SS7 deployment costs through greater network efficiencies that could result, for example, in lower access charges.[53] Further, as SS7 is used to support emerging technologies such as advanced intelligent network and personal communications services, LECs and IXCs can both realize new revenues from new services and from greater utilization of their networks to cover the costs of SS7 deployment.[54]

35. IXCs further argue that our decision improperly denies them compensation for transmitting interstate CPN. Again, however, they have not demonstrated that they are incurring significant uncompensated costs to carry it. Only AT&T, in an *Ex Parte* presentation made after the official

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[51] *Provision of Access for 800 Service*, Memorandum Opinion and Order on Reconsideration and Second Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 5422, 5428 (1991). This conclusion was based on findings that SS7 not only supports a number of new interstate and intrastate services, but also increases the efficiency with which carriers provide existing services. Although the focus of that order was costs incurred by local exchange carriers in deploying SS7 networks, the analysis also applies to interexchange carrier investment.

[52] For example, IXCs currently offer their own caller identification services through the delivery of ANI or CPN on 800 numbers.

[53] When compared to multifrequency signaling, SS7 signaling provides network efficiencies in establishing and releasing a call connection by more quickly connecting and disconnecting interoffice circuits before and after a call. Pacific Comments at 12.

[54] *See, e.g.*, Pacific Comments at 12-13.

comment cycle ended, attempts to provide quantitative data to support its assertion that costs IXCs incur to deliver CPN are not *de minimis*.

36. AT&T does not question that it receives CPN without a separate charge from LECs. Rather it alleges that the costs it incurs annually for delivery of CPN are eleven percent of its total interstate SS7 costs amounting to $79.6 million. This figure, however, does not withstand close scrutiny. First, AT&T's claimed annual interstate CPN delivery expenses include network depreciation and operating expenses associated with its SS7 network. These costs are not caused by CPN transmission. AT&T, like all major interexchange carriers, has incurred these expenses to derive efficiencies and new services from out-of-band signaling unachievable from in-band multifrequency signaling.

37. Second, AT&T's cost estimate relies, in part, on projections made by Pacific in a Petition for Rulemaking to Amend Section 69.106 of the Commission's rules.[55] In the Petition, Pacific characterizes $.0162 as "the direct cost (plus overhead) to set up a call." Pacific does not state that this figure represents an SS7 cost. In any event, Pacific's number is theoretical; it is not currently reflected in access rates.

38. Thus, AT&T's cost analysis is based on rates that Pacific might theoretically charge for services rather than costs that AT&T actually incurs for call set up. We believe AT&T's $79.6 million cost figure is unreliable for other

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[55] *Pacific Petition for Rulemaking to Amend Section 69.106 of the Commission's Rules* at 6, filed June 30, 1994. Pacific Bell requests the rulemaking so that the switched access local switching rate will encompass a per message call set up charge in addition to the per minute usage charge.

reasons, as well. AT&T assumes that SS7 costs should be allocated among message parameters based upon the relative numbers of bytes required to fill the field associated with each. Assuming that this is a reasonable allocation rule, AT&T argues that CPN passage accounts for eleven percent of bytes. Even assuming the total number of message parameters were relevant, which AT&T has not demonstrated, AT&T's determination that CPN costs amount to eleven percent of interstate SS7 expenses ignores the fact that CPN represents but a very small part of the total number of message parameters that are likely to be used in IXC SS7 networks. For example, in deriving its percentage factor, AT&T considers only the most basic "ISUP" call set up parameters. It does not include other ISUP messages, network management messages and TCAP messages routinely used in SS7 signaling. While we have no information in the record that enables us to determine how often these messages occur in AT&T's network, we believe that including such messages in its analysis would significantly reduce AT&T's claimed "CPN as a Percent of SS7."

39. AT&T also has ignored the fact that IXCs typically request LECs to provide both CPN and charge number parameters when using SS7 to set up a call. Interface specifications reflected in LEC access tariffs, for example, state that when an IXC requests these parameters – where charge number and CPN are the same – the CPN parameter alone is "populated" in the IAM.[56] In such situations, this means that an IXC need

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[56] Common Channel Signaling (CCS) Network Interface Specification, Bellcore, TR-TSV-000905 (Issue 2, July 1993).

carry only three, instead of twelve additional bytes of signaling information. AT&T's calculations assume that CPN passage requires carriage of twelve bytes in the IAM. Although we cannot determine from the record how often CPN and charge number are the same, some parties suggest it occurs on thirty-five percent to ninety-five percent of all initial address messages.

40. In any event, there is little reason to believe IXCs would realize new revenue from bargaining with LECs over passage of CPN, even if we agreed, as Sprint suggests, that the cost standard applied to CPN should not be marginal cost.[57] Under Sprint's model, the initiating LEC would be allowed to charge IXCs for providing CPN. There is no reason to believe that IXCs could negotiate better rates when selling CPN to terminating LECs than when buying CPN from originating LECs.

41. Our policy does not deny IXCs the ability or incentive to develop new SS7-based services. To the extent IXCs believe LECs are better positioned to use CPN to develop end user services, our policy creates incentives for IXCs to develop competitive alternatives to LEC distribution service. Indeed, as noted above, IXCs already provide some of these services directly. Moreover, IXCs are free to develop services based on CPN by reselling CPN acquired from LECs.

42. Finally, no legal rights of IXCs are compromised by a federal rule that requires interexchange carriers to transmit signaling information received from originating carriers to terminating carriers. Because the IXCs are recovering the costs associated with their deployment of SS7 through rates

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[57] Sprint Petition at 11-12.

for long distance services, they have no right under the Constitution or the Communications Act to be compensated again by LECs on the terminating end of calls on which CPN is passed. The CPN rule does not effect an unlawful taking of carrier property. The courts have made clear that the government may regulate rates "chargeable from the employment of private property devoted to public uses" and that "[s]o long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition."[58]

43. Furthermore, in order to determine whether rates are confiscatory, courts look at the end result, not at the rate-setting methodology.[59] In this case, the overall rates for long distance services certainly cannot be construed as "confiscatory." In particular, it cannot be claimed that the imposition of an additional requirement, resulting in merely *de minimis* additional costs, renders a rate confiscatory. Thus, the requirement that IXCs pass CPN to terminating carriers does not amount to a taking under the fifth amendment. Under the Communications Act carriers are entitled to compensation; they are not entitled to unfettered discretion as to the source of that compensation. Moreover, they cannot claim they were without adequate notice that we would adopt this policy. The Notice of Proposed Rulemaking in this proceeding documented that carriers were having difficulty in resolving financial arrangements related to passage of CPN.[60] The Notice expressed Commission intent to "resolve the legal, financial and technical issues implicated by the delivery of an interstate

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[58] *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

[59] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-13 (1989); *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944).

[60] NPRM at para. 9.

caller ID service."[61] The Commission asked for comment on the extent to which carriers had made progress in reaching agreements to provide service jointly and any impediments to such agreements being negotiated.[62] Commenters responding to the NPRM fully briefed the Commission on their respective positions; on reconsideration IXCs have not provided new or different information on this record that the Commission has not already considered.

44. *Conclusion.* We find our policy does not prevent IXCs from recovering their SS7 development and deployment costs. Our action here is consistent with our policies governing LEC recovery of these costs, that is, that costs that result in a general network upgrade ought to be borne by all network users. It encourages more, not less, development of new CPN-based services by removing uncertainty over intercarrier compensation that appears to have impeded their development previously. Our policies prohibiting restriction on resale of interstate service offerings mandate that terminating LECs not impede the resale of interstate CPN-based services.[63] Resale of interstate CPN should facilitate competition among carriers and the development of additional new services.

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[61] *Id.*

[62] *Id.*

[63] *See Resale and Shared Use of Common Carriers Services and Facilities*, 60 FCC 2d 261 (1976), *modified on other grounds* (*Resale and Shared Use Reconsideration Order*), 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2nd Cir. 1978), *cert. denied*, 439 U.S. 875 (1978). *See also Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d 167 (1980).

ii. Equipment Upgrades to Support CPN Delivery

45. *Background.* The *Report and Order* amended Section 64.1601(a) to require common carriers using SS7 and offering "any service based on SS7 functionality to transmit the calling party number associated with an interstate call to interconnecting carriers."[64] The Commission stated that carriers were not required to invest in SS7 technology in order to facilitate delivery of CPN, and were only required to deliver it where doing so was technically feasible.[65]

46. *Positions of the Parties.* Several petitioners request that the Commission clarify that SS7 can be used by carriers without the carrier being required to transmit CPN or provide blocking capabilities.[66] Otherwise, they say, they would be forced to upgrade offices that have been equipped with SS7 for purposes other than CPN-based service deployment, such as 800 data base service.[67]

47. Commenters addressing this issue argue that the existence of SS7 does not automatically guarantee the ability to transmit CPN and its associated privacy indicator.[68] GTE, for example, says that in some of its central offices, 800 calls are routed to tandem switches where SS7 signaling is used

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[64] Report and Order at para. 17 and Appendix C.

[65] *Id.* at para. 17.

[66] *See, e.g.,* Allnet Petition at 3-5; Cable and Wireless Petition at 3-4; NTCA Petition at 2-4; Sprint Petition at 13-14.

[67] Sprint Petition at 13. In these instances, carriers use the TCAP capabilities of the SS7 protocol, which is different from the ISUP part of the protocol used for call set up and CPN passage. Carriers cannot use TCAP to transmit CPN. *See* discussion *supra* at para. 20.

[68] *See, e.g.,* NTCA Comments at 2-3; GTE Comments at 20.

only to determine proper routing of the call. In these situations, it says, multifrequency signaling is used between the end office and the tandem switch, and other calls from those end offices do not use SS7 technology at all.[69]

48. GTE maintains that the decision to deploy SS7 capability and the decision to install caller ID and call blocking software are separate and distinct investment decisions.[70] GTE asserts that if the Order were to require full SS7 deployment at any location where SS7 were used for any purpose, no matter how incidental, all common carriers would be forced to reevaluate investment plans and possibly slow the deployment of CPN-based services due to increased costs.[71] US WEST assumes that interstate passage of CPN and any attendant blocking is predicated on technical feasibility.[72]

49. *Discussion.* We do not require carriers that do not have SS7 call set up capability to make the SS7 investments that would enable them to pass CPN. We attempted to make this clear by (1) stressing that carriers "are not required to invest in SS7 technology in order to facilitate delivery of the calling party number;" and (2) narrowly defining "Calling Party Number" to mean the subscriber line number or the directory number contained in the calling party number

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[69] GTE Comments at 18. Similarly, in twenty-one of its LEC offices, Sprint says that SS7 is used only for 800 data base service, and that current software cannot pass CPN. *See also* Sprint Petition at 13.

[70] GTE Comments at 20.

[71] *Id.* at 21; *see also* CompTel Reply at 1.

[72] US WEST Comments at 20, *citing* para. 17 of the Report and Order ("Carriers are only required to transmit the CPN and privacy indicator where technically feasible").

parameter of the call set up message associated with an interstate call on an SS7 network.[73]

50. The mere presence of SS7 features in a network does not bring with it CPN transmission functionality. Such functionality requires specific SS7 call set up capability. Moreover, because SS7 call set up capability already exists in nearly all major carrier networks, nationwide deployment of CPN services is possible. We see no reason to compel further deployment at this time.

51. Our decision means that consumers served by carriers not having SS7 call set up capability will be unable to use the new and valuable services that interstate passage of CPN makes possible until their carriers deploy this capability. We assume that many of these customers currently are not able to choose an alternate local exchange service provider. Nevertheless, we believe that the benefits of being able to pass and receive CPN and provide advanced wireline and wireless services will motivate additional service providers to make this investment. We expect that carriers without SS7 call set up capability will feel increasing competitive pressure to deploy it. We encourage the deployment of SS7 functionality sufficient to pass CPN wherever possible in order to provide consumers the widest possible range of CPN-based services.

B. Privacy: Blocking Mechanisms

52. We describe below how privacy interests have been addressed in federal and state regulatory regimes. We analyze

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[73] Report and Order at para. 17; 47 C.F.R. 64.1600.

the technological difficulties of reconciling state rules that allow calling parties to protect their privacy through per line blocking with federal requirements that a party placing an interstate call may protect his privacy by concealing CPN on only a per call basis. We reexamine the *67 privacy model established in our rules in light of new record evidence, find that it is not feasible to have separate federal and state blocking regimes on the same line, and adopt a model that requires *67 per call blocking and *82 per call unblocking where state policies permitting per line blocking are in effect. Finally, we describe our limited preemption of existing state regimes.

53. *Background.* In the *Report and Order*, the Commission determined that callers placing interstate calls should be able to prevent delivery of their number to called parties by dialing *67 on a push button telephone or by dialing 1167 on a rotary telephone.[74] In reaching this conclusion, the Commission balanced the calling party's privacy interests against the efficiencies and benefits attendant to free passage of CPN as well as the called party's privacy interests.[75] The Commission found that per line blocking was not the best choice for a federal model because it was not the most simple and uniform approach and because it unduly burdened CPN-based services and called parties by failing to limit blocking to only those calls for which the caller wished to conceal his CPN. The Commission rejected arguments that certain identified groups, such as domestic violence or law enforcement agencies,

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[74] Report and Order at paras. 68-69.

[75] The right of privacy is defined as "[t]he right to be let alone; the right of a person to be free from unwarranted publicity." Black's Law Dictionary 1195 (6th ed. 1990).

should be allowed to subscribe to per-line blocking,[76] determining that designation of a "general rule" – as part of the federal model for caller ID services – to resolve problems for "special cases" would not be optimal.[77] It stated that individuals wishing to block transmission of CPN on all originating calls could do so by purchasing terminal equipment for as little as $40.00 that automatically outpulsed *67 on each call.

54. The Commission noted that state regulatory regimes for protecting the privacy of calling parties ranged from no protection for callers to free per line or per call blocking. It did not preempt any of these intrastate regimes. It did, however, preempt states from: prohibiting per call blocking for interstate calls; requiring a different blocking alternative for interstate calls or prohibiting the offering of CPN-based interstate services.

55. *Positions of the Parties.* Many parties petition for reconsideration of the Commission's preemption decisions. In particular, some states urge the Commission to endorse state regulatory regimes for blocking that differ from the federal model. They argue that a federal model that only permits a customer to block passage of CPN on a per call basis is technically incompatible with state models that permit carriers to block all calls originating from a particular line.[78] NARUC argues that endorsing state policies minimizes caller confusion because callers most likely are aware of existing state requirements.[79] California urges that the Commission

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[76] Report and Order at para. 39.

[77] *Id.* at para. 40.

[78] *See, e.g.*, California Petition at 3-4; Florida Petition at 8.

[79] NARUC Petition at 12.

defer to state policies, except where the state does not provide for a generally available blocking option. In the latter case, it recommends that the Commission adopt a minimum federal privacy standard.[80] California notes its regulatory policies provide for consumers to elect per call blocking, per line blocking and "where feasible," per line enabling using *82.[81] Pacific states caller ID service is not currently offered in California because under California policy, subscribers who have an unlisted line (forty-four percent of Pacific's subscribers), and who do not elect per call blocking are automatically provided per line blocking. It urges the Commission to preempt California's per line default blocking policy for unpublished and unlisted numbers.

56. In the event the Commission refuses to defer to state policies, California offers a technical proposal to accommodate differing federal and state blocking regimes on the same line that it alleges requires minimal software changes for carriers.[82] Switch vendors, it claims, could incorporate minor modifications into their current development cycles, minimizing costs and causing only slight delay in meeting the Commission's timetable for interstate CPN passage.

57. A number of exchange carriers also urge the Commission to defer to the blocking regime of the state in which the call originates and require the carrier in the terminating

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[80] California Reply at 3.

[81] *Id.* at 6.

[82] California Petition at 7-10 and Appendix A. As we describe in more detail, *infra*, the proposal would rely on "unused" information bits in the SS7 IAM. The originating switch would add appropriate additional privacy information and the terminating switch would add software necessary to distinguish interstate from intrastate calls.

state to honor a privacy indicator that accompanies the interstate call.[83] Still others advocate either: (1) deference to state blocking policy; or (2) federal preemption of existing intrastate rules developed to accommodate intrastate caller ID service.[84] Some petitioners allege per line blocking is needed to minimize risks to health and safety.[85]

58. Most parties agree that a system in which one jurisdiction permits only per line blocking while the other permits only per call blocking would be unworkable.[86] Such blocking plans, Bell Atlantic says, would confuse consumers.[87] Parties further argue that such dual blocking methods raise difficult technical problems for which the California technical proposal offers no practical solution. Many parties maintain that technology to accommodate such different interstate and intrastate blocking rules simply does not exist today.[88] Sprint contends that LECs urging the Commission to defer to state preferences for per line blocking do so out of a concern for the burden on the local exchange industry that would result if subjected to a dual blocking standard.[89]

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[83] *See, e.g.*, NYNEX Petition at 3-4; Ameritech Petition at 3.

[84] *See, e.g.*, GTE Comments at 3; US West Comments at 12-13.

[85] *See, e.g.*, Domestic Violence Coalition on Public Policy Petition at 2; SAGE and SOAR Petition at 2, 5-11.

[86] *See, e.g.*, Sprint Comments at 7-8; Bell Atlantic Comments at 4.

[87] Bell Atlantic Comments at 4 (to determine whether their number will be disclosed to the person they are calling consumers should not have to ask themselves: "Where am I? Is this call interstate or intrastate? Is there per line blocking already on this line?"); *see also* SWBT Comments at 8.

[88] *See, e.g.*, US WEST Petition at 5.

[89] Sprint Comments at 7.

59. BellSouth argues that California's technical proposal to accommodate such dual blocking would require substantial changes to existing SS7 industry standards.[90] It says new standards would need to be developed, upon which the industry would need to agree, and that this would take a significant amount of time – even assuming an expedited process. According to BellSouth, SS7 switch requirements would have to be developed and software created to instruct switches not only how to handle new values, but also how to handle communication with switches that are not upgraded. BellSouth claims that California's proposal also is incompatible with approved national and international standards for ISDN.[91]

60. Some parties express concern that a dual blocking regime that permits per line blocking will undermine the value of CPN-based services to the public by increasing the number of calls for which calling party number is not passed.[92] By contrast, the advantages of the blocking scheme adopted in the *Report and Order*, they say, are numerous. This blocking scheme, they say, provides nationwide uniformity, decreases confusion, frees telephone company resources to develop new CPN-based products and services, and avoids costly changes to the network.[93] A number of parties that support a uniform blocking regime for interstate and intrastate calls say that a limited exception to a prohibition on per line blocking, to accommodate groups with heightened safety

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[90] See BellSouth Comments at 10; *see also* GTE Comments at 4.

[91] BellSouth Comments at 12.

[92] *See, e.g.*, Pacific Comments at 2-3.

[93] *See, e.g., Id.*; AT&T Comments at 2-5; MCI Comments at 9.

needs, would not unduly undermine the benefits of caller ID growth.[94]

Discussion

i. Federal Policy Objectives

61. A primary mission of the Commission is to regulate interstate and foreign communication by wire and radio so as to make available to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service.[95] In both this and other proceedings, we have identified the introduction of new technologies, the modernization of the nation's telecommunications infrastructure, and the offering of new services to the public as objectives essential to realizing this statutory goal.[96] The creation of a federal model governing passage of CPN is part of this effort.

62. The federal model we adopted was designed to employ a simple and uniform approach for the provision of CPN-based services. It created a baseline of expectations and performances associated with these services that sought to

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[94] *See, e.g.*, AT&T Comments at 2.

[95] 47 U.S.C. § 151.

[96] *See, e.g.*, Report and Order at paras. 11, 12; *see also Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, *aff'd in part and modified in part*, Memorandum and Order on Reconsideration, 10 FCC Rcd 244 (1994); *see also* 47 U.S.C. § 157.

balance calling and called party privacy needs and expectations. The model facilitated the offering of CPN-based services by removing barriers to the introduction and financial success of such services.[97] Among such barriers was uncertainty over the blocking policies that would govern an interstate call. The Supreme Court has made clear that where necessary to preserve Commission goals against conflicting state rules that thwart valid federal communications policies, the FCC may preempt state regulation if it is "not possible to separate the interstate and intrastate components of the asserted FCC regulation."[98] As we discuss below, we now conclude that CPN-based services are "jurisdictionally mixed" services, and that it is impractical and uneconomic to require the development and implementation of a dual blocking capability on the same line that would permit both the federal per call blocking system as adopted in the *Report and Order* and state per line blocking systems. In light of this, we have reexamined the *67 privacy model established in the *Report and Order* and now modify it in a way that will accommodate existing state per line blocking regimes while still permitting us to realize our federal policy goals of promoting the development of CPN-based services, consumer choice and privacy.

ii. Technological Relationship Between Interstate and Intrastate Caller ID

63. The record shows that both intrastate and interstate CPN-based services depend on use of the SS7 call set up

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[97] Report and Order at para. 11.

[98] *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n. 4 (1986).

protocol to pass CPN to the called party.[99] Using this protocol, a privacy indicator accompanies the CPN, and based on that indicator, a terminating switch determines whether to deliver the CPN to the called party whose line is equipped to receive it.

64. For the purpose of conveying a calling party's privacy request, the privacy indicator may only have a "value" of "on" or "off." This is populated either by a carrier assigning the caller's line a value indicating "private" (per line blocking); or, in the absence of this line assignment, by the caller pressing *67 before any particular call to request privacy on that call (per call blocking). Once a determination is made on how the caller's line is categorized – either "private" to connote per line blocking or "public" to connote per call blocking – the switch cannot change this determination as a function of the jurisdictional nature of the call. The technology, in other words, does not allow one blocking method, per line, to be used on intrastate calls and another blocking method, per call, to be used on interstate calls. We thus conclude that caller ID service with its attendant privacy indicators is a "jurisdictionally mixed" service.

iii. Dual Blocking Proposals

65. Some parties suggest that different state and federal caller ID privacy requirements can be accommodated by dual blocking mechanisms. We disagree. We believe the overwhelming majority of commenters in this proceeding have

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[99] *See, e.g.*, US WEST Petition at 5.

demonstrated that requiring only per call blocking for interstate calls while permitting per line blocking or no blocking on the same line for intrastate calls is not a practical option at this time. Switch vendors such as Northern Telecom, AT&T and Ericsson confirm that technological problems associated with implementing such a dual blocking regime make such dual blocking impractical.[100]

California's Proposal

66. California offered the only concrete technical proposal to accommodate two different blocking mechanisms on the same line. California argues that carriers can accommodate this dual blocking merely by making small software changes in originating and terminating switches as part of regular software upgrades.

67. Like the majority of commenters, we do not believe California's proposal can realistically be achieved by modest software changes as part of routine switch upgrades. First, California's proposal requires modifying existing subfields in the initial address message. These changes can only be made with the consent of industry standards bodies.[101] Although

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[100] *See* US WEST Petition, Attachments A, B, and C (containing information from various vendors on the costs and time required to introduce dual blocking); *see also* Sprint Ex Parte Letter of February 9, 1995 (stating that dual blocking rules will not work).

[101] Telecommunications standards bodies develop recommendations that guide telecommunications service providers and manufacturers of equipment to provide interoperable telecommunications systems and equipment that support national and worldwide telecommunications services. For example, the American National Standards Institute (ANSI) through its Committee T1 develops technical standards and reports

estimates vary, the time needed to accomplish such change is not insignificant and some parties suggest it could take years.[102] California's suggestion that changes can be effected within regular intervals planned for upgrading switch software fails to recognize the developmental work that must occur prior to a generic software release, the subsequent testing of software, or the changes that may result from that testing.[103]

68. Moreover, even if U.S. Standards could be changed to accommodate California's proposal, those standards would then be different from those of other countries unless international standards could be changed as well.[104]

69. Assuming standards could be modified on an expedited schedule, and that no material disadvantage would attach to U.S. industry for having standards different from the rest of the world, new software would need to be developed to enable switches to transmit and accept the new codings.[105] While it appears that the new software could be created to accommodate dual blocking for caller ID services, there

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supporting the interconnection and interoperability of telecommunications networks.

[102] GTE Comments at 5-7.

[103] *See, e.g., Id.* at 6-7.

[104] *See* BellSouth Comments at 12. California's initial proposal for modifying the SS7 presentation subfield for the presentation status of CPN, we note, is not only incompatible with national standards, but also is incompatible with current international standards for ISDN Calling Line Identification.

[105] *See, e.g.*, GTE Comments at 6; Pacific Bell Comments at 8-9 and Exhibit B.

remains, even so, the problem of switch processing of services reliant on earlier SS7 standards. For example, technical requirements and software would need to be modified for CLASS[106] and ISDN features based on such standards. Nor is it clear what impact the California proposal would have on services currently being developed, also based on existing standards. Interworking problems created by the modification of the SS7 standards would also need to be monitored carefully.[107]

70. Finally, at the terminating switch, the record indicates that new tables would need to be built that would contain the area codes of the state that the switch serves.[108] The terminating switch would also need to be modified so that it could analyze the new CPN privacy indicators and respond to the caller's privacy request. It is not clear whether these new procedures in the terminating switch would affect call processing or call set up time but switch manufacturers suggest that they might.[109] Moreover, we expect that customers will be confused by the operation of California's dual blocking proposal. They will need to remember that if an interstate call made from a telephone having per line blocking for

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[106] Custom Local Area Signaling Services (CLASS) represents a set of call management services on outgoing and incoming calls. Examples of CLASS services are caller ID, auto call return and selective call forwarding.

[107] For example, in the software development process requirements would need to address how an upgraded switch with the new coding capability interworks with a non-upgraded switch to honor the privacy request of the calling party correctly.

[108] These codes are sometimes referred to as NPA codes.

[109] *See, e.g.*, US WEST Petition Attachment A (Input provided by Northern Telecom).

intrastate calls is made, they need to dial *67 if they wish to block their CPN. If customers fail to dial the *67, they will receive no indication that their number will be displayed.

71. California does not dispute the carriers' argument that its solution would require modification of SS7 standards. Instead, it argues that the "outcome . . . of standards debates is largely determined by LECs" and that LECs could therefore dominate the standards arena to force an expedited acceptance of the changes it proposes.[110] Standards processes, however, depend also on the consensus and participation of switching and terminal equipment manufacturers, interexchange carriers, consultants, and others. Even if we assume LEC influence would be overwhelming in the national standards process, we cannot assume the same influence in the international standards process. The latter process draws world telecommunications interests at least as influential as the LECs and with often markedly different priorities.

72. We believe a requirement to modify current national and international standards, to develop new switch software for caller ID and many other CPN-based services, and to deploy these non-trivial software changes, as well as the time and expense associated with these activities, makes California's proposal infeasible. Moreover, it is not at all clear that California's proposal will have only a "small" impact on switch operation. California provides no development cost estimates in its proposal and there is no other evidence in the record to suggest that it will not be at least as high as the cost estimates for other dual blocking systems. Those estimates range between $70 and $500 million for a major LEC.

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[110] *See* California Reply Exhibit B at 3.

Switch Manufacturers' Dual Blocking Proposals

73. California provided the only specific dual blocking proposal to permit per line blocking for intrastate calls to coexist with a federal policy permitting only per call blocking of CPN for interstate calls. Other commenters, however, discussed what would be necessary to establish a dual blocking system. For example, switch manufacturers AT&T, NTI and Ericsson, also present cost and time estimates regarding changes needed to accommodate dual blocking regimes. The record shows that these estimates are not based on any industry standard or technical requirements.[111] Without these requirements, the accuracy of their cost projections and time frames for developing the dual blocking capability cannot be judged. According to Northern Telecom, developing such technical requirements could take as long as three years.[112]

74. Moreover, the dual blocking proposals presently conceived by these switch vendors fail to address a number of issues that could materially affect the availability of nationwide calling party number based services. For example, it is not clear to us how their blocking proposals, which require the originating end office to distinguish between interstate and intrastate calls, will enable the originating switch to determine the jurisdictional status of such non-geographically assigned Numbering Plan Areas (NPAs) as 500, 700, 800 and

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[111] *See, e.g.*, US WEST Petition Attachments A, B and C. Technical requirements would be based upon industry standards for dual blocking, which do not exist at this time.

[112] *See* SWBT and Northern Telecom *Ex Parte* Letter of February 8, 1995.

900.[113] Such codes do not provide information to the originating switch about the geographical location of the called party. This information can only be determined later in the call. Thus the manufacturers' proposals would leave unserved a sizable and growing field of numbers.

75. Even if such design problems could be resolved quickly, the record further indicates that additional time required for call processing using this technology would slow completion of almost every call.[114]

76. Nor does the cost associated with developing dual blocking systems appear to be insignificant. While the manufacturers' cost estimates vary because of uncertainty in using yet undeveloped technical requirements, the costs of upgrading LEC networks to accommodate the dual regime could be as high as $70-$500 million for a major LEC.[115]

77. We conclude on the basis of the record before us that it is not feasible as a technological and economic matter to develop a dual blocking system for CPN-based services within a time frame consistent with our objectives. While we are not prepared to say that dual blocking will always be infeasible, we need not demonstrate absolute future impossibility to justify federal preemption here. We need only show that interstate and intrastate aspects of a regulated service or

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[113] By contrast, in California's dual blocking proposal, the terminating end office makes the determination between intrastate and interstate calls.

[114] *See, e.g.*, GTE Comments at 7; AT&T Comments at 5, citing a BellSouth letter that dual blocking will increase call processing time.

[115] *See, e.g.*, US WEST Petition at 7 n. 10 and Attachment A; AT&T Petition at 11.

facility are inseverable as a practical matter in light of prevailing technological and economic conditions.[116] As explained in detail above, the record demonstrates this. Furthermore, California's suggestion that a regulatory proceeding of this kind is not the appropriate forum to decide at the "bit level" how to implement dual blocking regimes cannot release us from our obligation to consider seriously anticipated difficulties associated with record proposals for dual blocking. These difficulties include risks of significant delay, costs, and other negative effects on existing services. We may preempt inconsistent state regulation that would "negate" the exercise of our authority where, as here, the interstate aspects of the matter cannot be severed from the regulation of the intrastate aspects.[117] As we now explain, however, we are modifying our policy governing passage of CPN in a way that should result in a much narrower preemption of state policies than our decision in the *Report and Order* would have required. We believe our revised policy should nonetheless ultimately permit realization of our goals for interstate CPN-based services.

iv. Federal Preemption

78. Many commenters urge that we reconsider our policy not to permit per line blocking options. They have persuaded us that it is possible to accommodate per line blocking

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[116] *See, e.g., People of California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

[117] *Public Service Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

permitted or required by a state without thwarting or unreasonably impeding federal goals, if consumers always are able to unblock their line by dialing *82.

79. Our primary objective in this proceeding is to remove the uncertainty that is inhibiting the development of valuable interstate services. Because the states differ significantly on the extent to which and the method by which they require the CPN of a calling party to be concealed, it is impossible to accommodate all existing state approaches within a single federal model. In selecting the *67 per call blocking model, we chose a simple, uniform and inexpensive policy that attempted to balance the privacy interests of the calling and called parties. Unlike some states' policies, it gave all callers an opportunity to conceal their CPN, at no charge to the calling party. But unlike other states' policies, it did not accommodate per line blocking. We found per line blocking was not the best choice as a federal policy model because it was not the most simple and inexpensive choice and because it would restrict the development of CPN-based services by not limiting CPN concealment to only those circumstances where privacy is important to the calling party.

80. At the time we articulated that model, we believed that it might be possible to develop a dual system that could accommodate differing state and federal blocking systems on the same line. However, given the evidence presented in this record, we now believe that the creation of a system in which one jurisdiction permits per line blocking while the other permits only per call blocking is not feasible as a technological and economic matter. Accordingly, we have reexamined the *67 model to attempt to reconcile federal interests with those expressed by the states, paying special attention to the fact that many consumers across the country have become

accustomed to a wide range of blocking options. In this regard, we have taken special note of one regime proposed by California – uniform *67 for consumers who choose per call blocking and uniform *82 unblocking for those that choose per line blocking. This approach is only slightly more complicated than the *67 blocking model and preserves a consumer's ability to choose when to reveal and when to conceal CPN under either blocking arrangement. Where a line is blocked, this approach ensures the free transmission of CPN on a per call basis, at the election of the calling party. The decision to use *67 and *82, in short, maximizes consumer choice, is the federal policy least disruptive to state policies and goes the farthest to eliminate customer confusion.

81. Accordingly, we now modify our policy to adopt a model that requires a carrier to offer *67 per call blocking for every interstate call. We also require that carriers enable customers to unblock passage of CPN on lines with per line blocking by dialing *82. This approach should obviate significant reeducation efforts in the twenty-four states where per line blocking is generally available to consumers. Although interstate callers still may not know whether the line they are calling from is blocked, they are assured of CPN passage by first dialing *82, regardless of the status of the line. In some states, dialing *67 now unblocks the line. Under our revised federal model, this approach is preempted. Universal and exclusive use of *82 to unblock avoids the risks of inadvertently defeating a block by dialing *67.

82. The *82 feature also addresses our concern that consumers not be deprived of the ability to reveal CPN when they wish to do so. This maximizes the likelihood that the interstate CPN-based services we expect will develop will succeed or fail based on the calling party's choice whether to

reveal CPN. Although permitting universal per line blocking is likely to be more frustrating to parties subscribing to identification services – most commenters agree that the general availability of per line blocking makes these services less valuable – ultimately the success of the services will depend on callers choosing to reveal their number. Per line blocking simply offers calling parties an additional way to conceal the calling number.

83. Our federal policy is thus modified to accommodate state per line blocking policies as long as carriers offering per line blocking also include * 82 as an unblocking code. We believe this approach is technically feasible because the regime is in place in a number of jurisdictions.[118] In addition, commenters have not challenged California's representations that the approach is technically and economically reasonable. We will allow an initial period – until December 1, 1995 – for carriers to comply with the policy. Carriers able to demonstrate a compelling need for more time may file for waiver. Such waiver requests should set forth: (1) the facts that demonstrate why the carrier is unable to meet our compliance schedule; (2) the time within which they will come into compliance; and (3) a proposed schedule with milestones for meeting the compliance date.

84. Although we have modified our federal interstate policies to accommodate as many facets of states' caller ID policies as we can and still maintain our federal goals, there is one facet of California's intrastate policy – its per line blocking

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[118] Southwestern Bell and Bell Atlantic, for example, support it in several states. Southwestern Bell states that implementation of the approach in states that require some form of per line blocking is minimal.

default policy – that we believe will impede the accomplishment of those goals. California has directed carriers within its jurisdiction to assume that unless a customer with an unlisted or nonpublished phone number[119] affirmatively elects *not* to block passage of CPN for calls placed from that number, the customer has chosen to have his line blocked. Pacific states, and California has not refuted, that California's caller ID policy makes the offering of caller ID in that state infeasible.[120]

85. As an initial matter, it is not feasible to have different default policies for interstate and intrastate calls for the same reasons that it is not feasible to have different blocking policies for interstate and intrastate calls. Specifically, limiting the default provision to intrastate application is as much a practical and economic impossibility as providing separate privacy mechanisms for each jurisdiction.[121] As such, a per

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[119] Unlisted numbers, as used by California, are those telephone numbers available only through directory assistance but that do not appear in the white section of the telephone directory or street address directory. Public Utility Commission of California, Decision 92-06-065, June 17, 1992. n. 23, citing Pacific Bell Schedule Cal.P.U.C. No. A5.7.1.B.1. Nonpublished telephone numbers are not listed in any telephone directory, street address directory, or in the directory assistance records available to the general public. *Id.* n. 24, citing Pacific Bell Schedule Cal.P.U.C. No. A2.1.34.A.

[120] *See, e.g.*, Pacific Comments at 5-7. *See also* GTE *Ex Parte* presentation, January 25, 1995, at 4 (caller ID service is not offered by GTE in California).

[121] *See Public Utility Commission of Texas v. FCC*, 886 F.2d 1325, 1332-1334 (D.C. Cir. 1989); *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1043 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *North Carolina Utilities Commission v. FCC*, 537 F.2d 787, 791 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (severability may be a practicable and economic impossibility).

line default policy would govern calls from both jurisdictions. Thus, passage of CPN on interstate calls from California would automatically be blocked if the caller has an unlisted or nonpublished line, thwarting the federal privacy policy favoring transmission of CPN in the absence of an affirmative decision by the calling party to invoke privacy. As a general matter, our determination that intrastate and interstate privacy mechanisms are inseverable, or jurisdictionally mixed, has led us to modify our overall policy in order to accommodate states with per line blocking systems. We do not preempt state policies concerning per line blocking, but rather modify our federal model to permit those regulatory regimes. We do, however, in this one instance and in as narrowly tailored fashion as possible, preempt this limited aspect of California's per line blocking policy because it impedes achieving our federal goals.[122] Importantly, California's customers may still choose to have per line blocking by simply exercising their choice to do so. We are merely saying that to accomplish per line blocking by default rather than by customer choice conflicts with our federal goals.

86. California's default policy thwarts and impedes our federal goals for interstate CPN-based services. Initially, to the extent California's default policy prevents the deployment of calling party number identification services in California, it deprives the residents of, and callers to, that state of access to the benefits we have determined in this proceeding are

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[122] *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986); *See also People of State of Cal. v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990); *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990); (Order must be narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals).

associated with such interstate services.[123] It does this in a number of ways. First, unless carriers in California enable the lines of residents in that state to receive interstate CPN, these residents will be unable to realize the efficiencies and new service opportunities we believe will flow from interstate CPN-based services. Second, callers to California from other states also would be denied the benefits of these new services and opportunities when they made calls to businesses or residents in California. For example, callers to businesses would be subject to longer order processing times, longer credit verification processes, and more cumbersome call routing techniques. Similarly, absent number identification services, callers to residents are likely to have fewer completed calls than if they are calling residents who are able to recognize the calling party's number, and want to receive their call. The negative impact on interstate CPN policies is exacerbated because residents in California receive and transmit more interstate calling minutes than the residents of any other state.[124] Depriving parties participating in those calls from the benefits we anticipate of the deployment of interstate CPN-based services necessarily thwarts and impedes the accomplishment of our objectives, particularly the development of interstate CPN-based services.

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[123] As is noted in paragraphs 55 and 84 above, Pacific believes California's regulation of caller ID service, and in particular its default per line blocking requirement make the offering of the service in that state infeasible. Thus, the policy precludes intrastate as well as interstate service.

[124] In 1993, California accounted for more than thirty-six billion interstate calling minutes. New York, the next highest state, accounted for less than twenty-nine billion interstate calling minutes in 1993. Statistics of Communications Common Carriers (FCC, 1994) at p. 22.

87. California's policy also deprives both parties on an interstate call from California of choice, an important element in our balancing of the rights and expectations of the calling and called parties. First of all, we have determined that as a matter of federal policy, the called party should have access to incoming CPN unless the calling party has exercised his right not to have his CPN revealed. While we have carefully balanced the privacy interests of the calling party with the expectation of the called party to receive CPN, California's default policy upsets this balance on an interstate call. It elevates the interest of the calling party and thereby negates our federal privacy policy concerning the rights of a called party on an interstate call. California provides no evidence that a caller who chooses to have an unlisted or nonpublished number also wants per line blocking. It is not apparent that a customer with an unlisted number, readily available through directory assistance, would object to the passage of that same number to a called party of his choosing when he makes a telephone call. Indeed, while it appears that more than forty states offer some level of per line blocking, no other state automatically assumes callers with unlisted or nonpublished numbers want per line blocking.[125] The record indicates that the general availability of per line blocking adversely affects the penetration of CPN-based services.[126] Because we seek to

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[125] Pacific Bell Reply at 7. *See also*, NASUCA Petition at 13, *citing* NYPSC: "Per line blocking . . . generally reduces the number of calls to which [CPN] will be provided." 132 PUR 4th 525, 534-35 (NYPSC 1992).

[126] *See, e.g.*, BellSouth *Ex Parte* presentation, February 10, 1995 (within BellSouth territory, the availability of free, per line blocking depresses the market for CPN-based services: in North Carolina, with free per line blocking, Caller ID service is taken by one half of one percent of all line subscribers; in Tennessee, with no blocking, 8.5 percent of all eligible line subscribers take the service).

make interstate CPN-based services widely available, we are reluctant to conclude, absent any supportive evidence, that California's assumption is correct.

88. California also asserts that the preemption of its default blocking requirement will potentially subject carriers to civil tort liability for violation of the state constitutional right of privacy.[127] We do not here assess whether California is legally correct on this point. This argument, however, does not affect our decision to preempt the default blocking requirement. The carriers themselves have asked us to preempt, suggesting that they are prepared to accept any risk of liability. Moreover, the carriers have the responsibility, as well as the ability and the incentive, to protect themselves against tort liability.

89. The California PUC asserts that "state telecommunications privacy regulation is not subject to federal preemption."[128] The California PUC also asserts that preemption of default line blocking for customers with nonpublished and unlisted numbers would violate state and federal free speech rights by "effectively compel[ling] and requir[ing] them to disclose their unlisted telephone numbers on every call they make as a condition of using the telephone."[129] California alleges a violation of a First Amendment right not to speak, as well as a First Amendment right to speak anonymously, citing cases under both the United States and California

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[127] California *Ex Parte* Letter, April 25, 1995, at 4.

[128] *Id.* at 4. California offers no support for this proposition.

[129] California *Ex Parte* Letter, April 27, 1995, at 2.

constitutions.[130] We do not agree with these arguments. Taken to their logical extreme, California's arguments would require default line blocking throughout the country if, in fact, the First Amendment would be violated in the absence of such blocking. We cannot accept such a conclusion.

90. First, we note that the federal cases on anonymity cited by California appear inapposite. For instance, California cites *McIntyre v. Ohio Elections Commission*, ___ US ___, 63 USLW 4279 (Apr. 19, 1995), as evidencing a right to speak anonymously that would be contravened by preemption of the line blocking default. That case did not create a generalized right to anonymity, however. Rather, the Court applied "exacting scrutiny" in reviewing a statute directed to core political speech (the distribution of handbills addressing the merits of a school tax referendum), stating that "no form of speech is entitled to greater constitutional protection."[131] The *Talley* case cited by California similarly involved anonymous leafletting as a means of political advocacy.[132] The disclosure of one's telephone number in the caller ID context is not analogous to such "core political speech," and thus should not be subject to the same level of exacting scrutiny.

91. Another important distinction is that both *McIntyre* and *Talley* involved total bans on anonymous speech. As to both the "right not to speak" and the "right to speak anonymously," no customer in California will be compelled to

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[130] *Id., citing, inter alia, Talley v. California*, 362 U.S. 60, 64 (1960); *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1, 10-11 (1987); *Harper & Row v. Nation Enterprises*, 471 U.S. 524, 559 (1985).

[131] *McIntyre*, 63 USLW at 4283.

[132] *Talley v. California*, 362 U.S. 60.

disclose his or her telephone number. Our decision fully allows all California residents, consistent with California policy, to block passage of CPN by choosing either per call or per line blocking. All that is necessary is that the customer make the decision to do so. California asserts that, despite its extensive education requirements, thirty percent of customers will not understand how to block passage of CPN. The study cited by California, however, was conducted in the context of telephone service generally. In the case of caller ID, however, customers with unlisted and nonpublished numbers have already demonstrated such an interest in the privacy of their telephone numbers that we find it implausible that nearly one-third of them would ignore, or not understand, repeated bill inserts, and the other educational requirements that California has imposed.[133] In fact, California asserts that customers with nonpublished numbers are three times more likely than average to purchase caller ID services,[134] which suggests that these customers are more aware of such services than the average subscriber, and thus are more likely to understand the accompanying blocking features. Thus, California's factual assertions are speculative. We do not believe that the preemption of California's per-line blocking default would "compel" unwanted disclosure of telephone numbers.

92. Moreover, as we discuss in Section IV B, *infra*, carriers are responsible for conducting effective education programs. There is no evidence in the record that these

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[133] Carriers in California must, among other things, provide notification in multiple languages, use bill inserts, white pages, brochures and advertising, and conduct ongoing customer awareness surveys. CPUC Order (A-90-11-011, p. 48).

[134] California *Ex Parte* Letter, April 27, 1995 at 3.

programs, which to date generally have been organized under state guidelines or requirements, have not been effective. California has considerable discretion to assure that its education programs, address unique situations in that state.

93. As for the California cases cited by the PUC, and the PUC's own conclusions in its decision on caller ID services offered in California, to the extent that the California constitution does, indeed, require a per line default blocking option for customers with unlisted or nonpublished numbers, we nevertheless find it necessary to preempt such regulation for the reasons stated above.[135] Under the circumstances here, we find authority to preempt the state constitution, in addition to the regulations of the PUC, where necessary. We deny California's request that application of our rules in California be stayed pending the opportunity for court review.

94. On a related matter, Pacific also suggests that we preempt the offering of free per line blocking because it thwarts our federal policy of promoting passage of CPN. Based on the record, we do not find it necessary to preempt state policies that require or permit free per line blocking at this time. The cost of providing per line blocking appears to be small for carriers having call set up capability, and we believe that the interstate portion of these costs would be *de minimis*. Given that we have required free per call blocking and we have modified our privacy mechanism to accommodate states that have per line blocking, permitting per line blocking without a charge appears consistent with our policies. One of our goals here is to preempt the states as

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[135] Pacific disputes California's allegation that the CPUC found the California State Constitution requires a default per line blocking option. Pacific *Ex Parte* Letter, April 27, 1995 at 2.

minimally as possible, and allowing states to prohibit charging for a privacy mechanism that our rules now permit does not rise to a level of intrusion on our policies that could require preemption.

95. Our finding that it is not feasible to have separate federal and state blocking policies also requires that we preempt state policies that offer no blocking options to callers. We preempt state requirements that per call blocking be implemented by a means other than *67 or that per call unblocking be implemented by a means other than *82. We have tried to make our preemption of state policies as narrow as possible. Our preemption here is consistent with our earlier preemption of state policies that: (1) prohibit the offering of interstate CPN-based service; (2) require blocking alternatives on interstate calls different from those adopted by the Commission; and (3) require blocking systems that interfere with the use of *67 to achieve blocking on interstate calls.

C. Application of Caller ID Rules

i. Wireless Services

96. *Background.* In the *Report and Order* the Commission did not exempt cellular carriers from the requirement that carriers capable of passing CPN must do so. NYNEX commented at that time that technical standards for transmission of CPN between cellular and landline carriers still were being developed.[136]

97. *Positions of the Parties.* Parties petition the Commission to clarify that its caller ID rules apply to all wireless

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[136] Report and Order at para. 15.

carriers.[137] SWBT argues that federal rules must include private mobile service providers, not just cellular carriers, to ensure availability of nationwide caller ID service.[138] The U.S. Coast Guard asks whether the rules apply to satellite communications provided by INMARSAT and AMSC.[139]

98. Commenters generally support the view that caller ID rules should apply to all wireless carriers.[140] While SWBT does not dispute that FCC rules apply to wireless carriers, it says that its cellular switches cannot currently pass CPN because they lack necessary software that only its switch vendors can provide. SWBT expects delivery of that software before April 1995, but cautions that this is not a certainty.

99. Wireless services providers further request clarification of the scope of our blocking requirements for their services.[141] Nextel urges the Commission to preempt state regulation to the extent it interferes with federal rules intended to create a uniform framework for wireless delivery of caller ID.[142] Nextel says that as a nationwide wireless communications service provider, it cannot efficiently operate its systems within a framework of fifty potentially different and conflicting regulatory schemes. SWBT seeks federal preemption of all state laws that regulate caller ID service

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[137] *See, e.g.*, SWBT Petition at 9; United States Coast Guard Petition at 1.

[138] SWBT Petition at 9; *see also* Nextel Petition at 3; McCaw Petition at 5.

[139] United States Coast Guard Petition at 1.

[140] *See, e.g.*, Bell Atlantic Comments at 4.

[141] *See, e.g.*, United States Coast Guard Petition at 1; SWBT Petition at 9.

[142] Nextel Petition at 6.

provided by cellular and PCS services, claiming that these systems cross state boundaries and may not "know" which blocking method – state or federal – to employ.[143]

100. *Discussion.* We clarify that our CPN rules apply to all common carriers, both wireline and wireless. It is only through free passage of CPN across all types of interconnecting interstate common carrier networks that the advantages of CPN-based services will be fully realized. Consistent with the Commission's determination that private mobile radio service providers are not subject to common carrier regulation, we do not apply our rules to these service providers. The rules do apply to all Commercial Mobile Radio Services (CMRS) and other wireless common carriers.[144] By applying the same rules to CMRS and wireline carriers, we intend to remove the regulatory uncertainty that appears to have impeded the development of interstate CPN-based services.

101. Commenters have not urged us to treat wireless carrier services differently from wireline services, although the interests of wireless users may be different from the interests of wireline users.[145] For example, cellular customers

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[143] SWBT Petition at 11. SWBT points out that cellular service areas extend across state boundaries.

[144] CMRS is defined as "any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public. . . . " The term "interconnected service" means "service that is interconnected with the public switched network. . . . " Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, § 6002(b)(3)(B), 107 Stat. 312, 392 (1993); *see also*, Section 20.3 of the Commission's Rules, 47 C.F.R. § 20.3.

[145] The benefits of caller ID for CMRS customers are more complicated. For example, in order for a CMRS customer to be able to

may have more incentive than wireline customers to block delivery of their CPN and thus a greater need for a simple uniform blocking policy.[146] Without uniform treatment of carrier networks, a myriad of differing state and federal rules would create technical, operational and administrative problems for carriers that would delay development of CPN-based services. Moreover, we expect that the straightforward approach of applying the same rules to wireline and CMRS should reduce customer confusion. Finally, because development of CMRS SS7-based services has only begun, we anticipate that the articulation of a single rule will allow CMRS and equipment providers to plan their deployment of those services. For those CMRS carriers that are technically unable to pass CPN, there is no requirement that they do so. We recognize that investment in cellular networks' SS7 technology is occurring in stages and differs from network to network. A carrier's ability to transmit and receive CPN will depend upon the level of SS7 deployment within its network, the specific methods of interconnection, and type of software loaded into various switches. We require that CMRS providers comply with caller ID requirements with respect to roaming

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view the number of the incoming call, the customer must possess a phone with digital capabilities. Today most cellular customers possess cellular phones that use analog technology that cannot display the caller ID information.

[146] For example, cellular customers are usually billed for airtime charges on incoming calls. As such, cellular telephone users generally make their numbers available only to a limited number of people. This is an attempt to reduce the number of calls to their cellular number for which they would not want to pay. Thus, it is likely that cellular callers would be inclined to dial *67 and block delivery of their number to reduce the widespread distribution of their number.

customers to the extent that it is technically and economically feasible to do so.[147]

ii. Public Payphones, Hotel/Motel Services and Partylines

102. *Positions of the Parties.* Public payphone providers request that the Commission clarify whether privacy requirements for interstate calls apply to payphones. According to GTE, developing and installing the capability to meet such requirements will require costly network modifications.[148] Pacific estimates that it would need several years to bring less than one percent of its payphones into compliance.[149] Nevada Bell argues that blocking from payphones is

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[147] Roaming describes the situation which occurs when the subscriber of one CMRS provider enters the service area of another CMRS provider with whom the subscriber has no preexisting service or financial relationship and attempts either to continue an in-progress call, to receive an in-coming call or to place an out-going call. *Interconnection and Resale Obligations Pertaining to CMRS,* CC Docket No. 94-54, Second Notice of Proposed RuleMaking, FCC 95-149 (released April 20, 1995) at para. 45. CMRS providers providing service to a roaming customer from a different state are not subject to the per line blocking requirements of the roaming customer's home state. CMRS providers, however, are required to notify their customers that blocking requirements may differ when the customer is roaming outside the customer's home state.

[148] GTE Comments at iv, 24.

[149] Pacific Petition at 7. Pacific indicates that less than one percent of its pay telephones is served by switches that will not recognize *67 as the blocking indicator. Pacific plans to replace these switches by 1998 and seeks a waiver of the *67 rules for payphones served by these switches until that time. It indicates that in the absence of a waiver it will have to upgrade these switches, and finds little justification in the upgrade costs since the switches will soon be replaced.

inconsistent with state regulation.[150] According to BellSouth, the privacy interests of those using payphones is not compromised by delivery of CPN because it cannot identify the calling party by geographic location.[151]

103. By contrast, SAGE and SOAR strongly support per line blocking for public telephones located at shelters and domestic violence agencies.[152] Shelters, it says, cannot adequately monitor the use of public telephones and without per line blocking, a resident or young child might unknowingly make an unblocked call to an abuser, endangering shelter staff and residents.

104. *Discussion.* As we have stated throughout this proceeding, passage of CPN can create risks to calling parties in circumstances where they wish to prevent their numbers from being revealed. We have crafted our federal policy to recognize the privacy right of the called party to know who is calling, while at the same time enabling the calling party to conceal the telephone number from which he is calling. Having one rule governing as many categories of subscriber loop as possible minimizes customer confusion.

105. A number of LECs argue that we should not extend a per call blocking requirement to payphones, telephones in hotels or motels, or those connected to partylines.

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[150] Nevada Bell Petition at 6-7; *see also* SWBT Petition at 7 (adding that providing blocking at payphones is inconsistent with the wishes of law enforcement officials).

[151] BellSouth Petition at 5.

[152] SAGE and SOAR Petition at 10.

BellSouth argues, for example, that whatever general "societal expectation" of privacy our rules are designed to accommodate should not extend to payphone users because delivery of their station telephone number cannot identify them. We cannot agree with the fundamental premise that these telephone users have significantly different privacy expectations than users of other services.

106. As SAGE and SOAR make clear, the effect of disclosure of any type of identifying information in certain circumstances can result not only in serious threats to the calling party's security, but also can escalate into issues of life-threatening proportion.[153] For example, an abused woman may be in hiding from her abuser, but might still need to contact him to coordinate child support and visitation issues or to discuss legal separation or divorce matters.[154] If she makes a call from an unblocked public telephone in a shelter or from a motel where she is hiding, or from the partyline of a friend, the abuser may be able to discern her approximate location. An abuser may learn her approximate location by recognizing the area code or the first three digits of the local number or by returning a call to the location. Although the record in this proceeding is limited regarding the scope of risks, we cannot agree that callers using payphones, hotel or motel lines or partylines do not have privacy interests that should be respected in the federal policy.

107. We are aware that meeting federal privacy requirements for partylines and some payphones will require a financial outlay by carriers. We expect, however, that they will

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[153] SAGE and SOAR Comments at 4.

[154] *Id.* at 9-10.

recover these costs from ratepayers. Moreover, carriers have not shown why the reasonable privacy expectations of those placing calls from payphones, hotel and motel lines, or party-lines should not receive the same protection as residential telephone users receive. We find, moreover, that in some circumstances, at least, users of these services may need more protection. The public health and safety concerns raised by SAGE and SOAR compel the requirement we now impose.

108. We will give carriers until January 1, 1997 to provide per call blocking and per line unblocking capability to public payphones and to partyline telephones. It appears that most public payphones already support per call blocking and that a per line unblocking capability can be readily deployed.[155] This compliance date offers a reasonable time for carriers to make necessary upgrades. Although callers from these payphones will be at some risk of inadvertently revealing their calling number until upgrades are completed, invoking *67 on these phones will result in a fast busy signal to the caller. Callers will receive at least some notice from this signal that privacy is not being provided on the call. Similarly, BellSouth notes it is phasing out partyline service. Partyline callers also receive a fast busy signal if *67 is dialed. Again, setting the compliance date to January 1, 1997, appears to give sufficient time for carriers to bring partyline

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[155] Cincinnati Bell Comments at 2 (Cincinnati Bell currently has per call privacy option at public pay telephones served by DMS 10 and 1AESS central offices, which do not require separate software purchases to provide per call blocking for public payphones. With 5ESS switches, however, per call blocking at public payphones would require purchase of a separate switch feature, which CBT does not currently have.); *See also* Pacific Petition at 7 (less than one percent of its payphones are served by switches that do not recognize *67 as a blocking request).

customers the same capabilities available to other callers if their CPN can be passed on an interstate call. There is no evidence in the record that hotel or motel telephones present unique problems. Absent such evidence, we make them subject to our general rule, with the PBX exception discussed below.

iii. Emergency Services

109. *Background.* The Commission established several limited exceptions to the requirement that carriers honor privacy requests. It concluded that caller ID services used solely in connection with legally authorized call tracing and trapping procedures did not need to honor privacy requests a customer made by dialing *67. The Commission also found that while blocking mechanisms do not stop passage of the calling party's number for Enhanced 911 services based on ANI technology, such mechanisms could jeopardize other emergency services that instead rely on SS7 caller ID services.[156] The Commission concluded that to the extent that CPN-based services are used to deliver emergency services, federal privacy requirements should not apply to delivery of CPN to a public agency's emergency line, a poison control line, or in conjunction with 911 emergency services.[157]

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[156] Report and Order at para. 37. Enhanced 911 (E911) may provide the telephone number and address of the location where the E911 call originated to the Public Safety Answering Point, or PSAP attendant. Currently, ANI is used most often to provide the telephone number and to facilitate accessing a data base to retrieve the caller's location, but CPN may be used in the future.

[157] 47 C.F.R. § 64.1601(d); Report and Order at para. 37.

110. *Positions of Parties.* Several parties ask the Commission to reconsider its ruling that by dialing *67 customers should not be able to block CPN's delivery to a public agency's emergency line, a poison control line, or in conjunction with 911 emergency services. Carriers state that current blocking technology does not allow them to identify an emergency service provider so that they can ignore the privacy indicator.[158] Parties generally agree that because E911 services that permit 911 service providers to determine the location of the caller generally rely on ANI and not CPN, location service is not jeopardized. They state, however, that developing a capability on a public agency's emergency service line or poison control line that would ignore or overrule a blocking instruction would require software development. Others argue that public safety questions such as this should be left to state policies.[159]

111. *Discussion.* The rule adopted in Section 64.1601 requires that whenever CPN is delivered on a call, and the calling party has dialed *67 on that call, carriers must act in accordance with the customer's privacy request.[160] Exceptions were established for calls within private networks, calls to emergency lines, or in connection with authorized law enforcement trap and trace activity. In other words, a request for privacy on these calls would not necessarily be honored. We believe that whether calls to emergency lines receive confidentiality is a public safety question that is best left to

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[158] *See, e.g.,* Bell Atlantic Petition at 1; US WEST Petition at 3; Nevada Bell Petition at 3.

[159] *See, e.g.,* NARUC Petition at 13; NASUCA Petition at 12; NYPDS Petition at 7.

[160] 47 C.F.R. § 64.1601.

state and local government authorities. Consequently, we will continue to exempt calls to emergency lines from the general federal requirement that carriers must respect a caller's request that his calling party number not be revealed.

D. ANI and Caller Privacy

112. *Background.* The *Report and Order* recognized that IXCs were making calling parties' charge numbers available to subscribers of 800 and 900 services. SS7 delivers both CPN and charge number, which carries ANI information. Instead of requiring IXCs to honor privacy requests relating to CPN for ANI services, the Commission adopted controls on the use subscribers could make of the information they obtained from these services. The Commission stated that carrier tariffs or contracts offering these services generally must require that ANI customers not reuse information without the permission of calling parties. ANI customers could reuse the information to offer products or services directly related to the original call.

113. *Positions of Parties.* CPSR argues that SS7 provides the calling party the ability to designate a preference for privacy. It argues that IXCs should not be free to ignore these requests.[161] Nevada contends that the Commission should prohibit the use of ANI information for any marketing unless customer consent has been obtained.[162] AT&T states CPN is not, and may never be, ubiquitously available. It believes ANI services have contributed to efficiency and productivity, and

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[161] *See* CPSR Comments at 1 and 9.

[162] *See* Nevada Comments at 3-4.

that the Commission's rules strike the correct balance.[163] IIA opposes the request of Nevada and others that the "directly-related" limitation on subsequent marketing be narrowly defined.[164]

114. *Discussion.* The parties have not persuaded us to modify our rules regarding ANI services. ANI information may not be reused or resold for other purposes without a caller's consent, even where the called party has paid for the call. The called party is limited to using the information only to market services directly related to the subjects of the calls from which the ANI was obtained. The burden in any complaint proceeding will be on the marketer using ANI information to establish that the newly offered product is directly related to prior transactions. The customer can request not to be called in the future, and the ANI service provider must honor that request.[165] This approach protects the interests of all parties.

IV. THIRD NOTICE OF PROPOSED RULEMAKING

A. Private Branch Exchange Systems

115. *Background.* Private Branch Exchange (PBX) systems are customer-owned equipment that act as switches for telephones connected to them. The telephones connected to the PBX do not connect directly to telephone company facilities. Rather, they are connected to those facilities through the PBX. The *Report and Order* did not separately address PBX systems, but it did exempt CPN delivery services within a

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[163] *See* AT&T Comments at 16-20.

[164] IIA Comments at 3.

[165] 47 C.F.R. § 64.1200.

private network from the CPN policies adopted in the Order.[166] It concluded that the privacy expectations of the calling party are different when the individual is placing calls terminating within a single private network.[167]

116. *Positions of the Parties.* Northern Telecom states that its PBX equipment cannot currently provide per call blocking with a *67 "privacy flag" and that reprogramming to accomplish this would be costly.[168] It maintains that business services should not be subject to the same privacy requirements as residential services because of differing privacy expectations, and at the very least, existing PBX sets should be exempted from such requirements through a "grandfathering" provision.

117. *Discussion.* To this point this proceeding has dealt with the obligations being imposed on carriers providing interstate services. If PBX equipment can pass CPN to the public switched network, but does not enable callers using telephones connected to the PBX to indicate a privacy request to switches in the public network, we believe it creates risks to calling parties that need to be addressed in this proceeding. As is the case with partyline and payphone users, we reject the argument that parties making calls through PBX equipment have no privacy expectations or requirements. PBX systems are installed in many different settings, including shelters for abused persons. PBX systems not capable of activating the privacy indicator with *67 apparently return a

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[166] 47 C.F.R. § 64.1601(d).

[167] Report and Order at para. 36.

[168] *See* Northern Telecom Petition at 3. A caller from a telephone linked to one of its PBXs, it says, will hear a "fast busy" tone if *67 is dialed.

fast busy signal to the caller. Although risks to safety in these circumstances are somewhat attenuated, we believe PBX systems should enable callers using them to place a call passing through the public switched network to conceal their calling number by dialing *67. Similarly, we believe that parties should be able to pass their CPN from lines that have been blocked should they choose by dialing *82.

118. We therefore issue a separate Notice of Proposed Rulemaking proposing that PBX systems capable of delivering CPN to the public switched telephone network also be capable of: (1) delivering a privacy indicator when the user of a telephone served by the PBX dials *67, and (2) unblocking the transmission of their CPN when the user dials *82. We ask parties commenting on this issue to provide a full record upon which to base a reasonable timeframe to bring PBX systems into compliance. At a minimum, we ask that they answer the following questions: Approximately what percentage of deployed PBXs are capable of supporting the *67 blocking code and *82 unblocking code; What percentage are not? Approximately how many lines are served by the respective systems? What are the costs of retrofitting deployed PBXs? What are the costs of conforming new, not yet manufactured, equipment? What timeframe should be established for retrofitting deployed equipment? What timeframe should be established for conforming newly-manufactured equipment? Who should bear the costs of retrofitting deployed equipment? What public policy reasons would justify not requiring deployed equipment to conform? If newly manufactured or deployed equipment does not conform, should it be labeled to inform users of its deficiencies? What are the costs and benefits of requiring labeling?

B. Private Payphones

119. *Background.* Commenting parties do not generally address the impact of federal privacy rules on private payphones. Nevertheless, we are concerned, as with PBX equipment – both PBX and private payphones are CPE – that if private payphones pass CPN to the public switched network, but do not enable callers to indicate a privacy request to switches in the public network, risks are created to calling parties that need to be addressed in this proceeding. In addition, we are concerned that retrofitting operating and already manufactured private payphones to comply with federal caller ID rules may pose unique and costly problems. Private payphones, unlike public payphones, may not be capable of supporting blocking and unblocking through "universal" changes at the central office. Instead, such changes may need to be made "payphone by payphone" because all relevant circuitry is contained in individual telephone instruments. The costs for such retrofitting could be high.

120. *Discussion.* On the basis of the current record, we cannot accurately address the overall impact of requiring blocking and unblocking from private payphones. To address these issues, we propose that private payphones be subject to our caller ID privacy rules and ask commenters to address the questions that we pose above in connection with PBX systems capable of delivering CPN to the public switched network and any others they consider relevant to our making an informed decision that some or all private payphones should be capable of supporting blocking and unblocking.

IV. SECOND REPORT AND ORDER

A. Application of Caller ID Rules to Other CPN-Based Services

121. *Background.* In the *Report and Order,* the Commission tentatively concluded that its policies and rules governing delivery of calling party number should also apply to services delivering calling party name.[169] It sought comment on this tentative conclusion and further sought comment on whether its privacy policies should extend to other services, such as those that permit subscribers automatically to return calls.[170]

122. *Positions of Parties.* Most commenters support application of a uniform privacy policy to govern delivery of both calling party name and number.[171] They argue that the same privacy considerations apply to each, and that using different blocking schemes to protect privacy would only confuse customers and increase carriers' costs.[172] Currently, they say, carriers offer the same blocking options for both services.

123. COCC recommends that while a uniform policy should govern each, the applicable policy should be that of the states, not the Commission.[173] PRC disagrees that there

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[169] Report and Order at para. 50.

[170] *Id.*

[171] *See, e.g.,* Ad Hoc Telecommunications User Group FNPRM Comments at 3; Pacific FNPRM Comments at 3; Sprint FNPRM Comments at 3; SWBT FNPRM Reply at 5; AT&T FNPRM Reply at 5.

[172] *See, e.g.,* US WEST FNPRM Comments at 2; SWBT FNPRM Reply at 1.

[173] COCC FNPRM Reply at 4.

should be a uniform policy, arguing that the potential for abuse is greater when a party's name is delivered.[174] ITAA opposes privacy protection for calling party name, which, it says, is a competitive enhanced service and should not be subject to regulation.[175]

124. Commenters generally argue that privacy rules should apply to call return services but disagree on what those rules should be.[176] COCC argues that when a calling party blocks passage of CPN, a called party attempting to use a call return service should not be allowed to return that call.[177] Ad Hoc states that callers should be able to block automatic return call features on the same basis as they can block the CPN of the original call under our caller ID rules.[178] COCC reports that US WEST offers call return services within Colorado and that a Colorado PUC order requires that such services be configured so as not to return calls on which callers have blocked their calling party number.[179]

125. Others urge that called parties should be able to return calls using call return services, regardless of the privacy indicator. According to Bell Atlantic, privacy concerns about call return service that CPN marked private will be

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[174] PRC FNPRM Comments at 6.

[175] ITAA FNPRM Comments at 6.

[176] *See, e.g.*, Ad Hoc FNPRM Comments at 5; BellSouth FNPRM Comments at 5; COCC FNPRM Comments at 3. *But see* US WEST FNPRM Reply at ii (stating that the Commission should not prescribe any particular privacy treatment with respect to auto call return).

[177] COCC FNPRM Comments at 3.

[178] Ad Hoc FNPRM Comments at 5.

[179] COCC FNPRM Comments at 3.

inadvertently disclosed are misplaced.[180] It says that it has been successfully offering the service for years in areas that permit caller ID blocking.

126. On the issue of masking the number of the original calling party when a call return service is invoked, carriers are divided. US WEST maintains that when a charge is incurred for a call returned using the service, no party's privacy is violated if the bill presented to the party who must pay for the call being returned reveals the number reached when "Call Return" is used.[181] Sprint says that suppressing billing information will create customer service problems and will require additional software to implement.[182] By contrast, Bell Atlantic says that it does not currently provide blocked number information on bills.[183] With respect to all other CPN-based services, most commenters argue that federal CPN privacy policy should apply.[184]

127. *Discussion*. We conclude that when callers request that their number not be revealed to the terminating called party on an interstate call, it is reasonable to treat their calling name similarly. Thus, we require carriers not to reveal calling party name whenever a caller requests that calling party number not be revealed. Revealing the name of the person who subscribed to the line from which a call is made is no different, in principle, from revealing that party's telephone

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[180] Bell Atlantic FNPRM Comments at 2.

[181] US WEST FNPRM Reply at 6.

[182] *See* Sprint FNPRM Comments at 5-6.

[183] Bell Atlantic FNPRM Reply at 2.

[184] *See, e.g.*, Ad Hoc FNPRM Comments at 4; AT&T FNPRM Reply at 5; Rochester Telephone FNPRM Comments at 2; Roseville Telephone FNPRM Reply at 5.

number. Accordingly, when calling parties impose a block on the delivery of their calling party number, we require that calling name, as well as calling number be blocked.

128. Such regulatory treatment is consistent with the current LEC practices. Either both pieces of information are delivered or both are blocked. The single exception is with respect to BellSouth in Tennessee. In Tennessee, when privacy is indicated, the calling party number is not delivered, but the calling name is.[185] For the reasons we describe in Section III, *supra*, it is not technically and economically feasible to have a different state and federal privacy regime operating on the same line in connection with a CPN-based service that varies as a function of the jurisdictional nature of the call. We must therefore preempt Tennessee's privacy policy as it relates to calling name delivery on calls in which callers have invoked privacy on delivery of their calling party number. If our rules governing carriers' obligations to conceal calling name and number were different, we believe the result would be unnecessary expense for carriers and increased confusion for customers. Given our finding that different federal and state blocking policies are not feasible, our preemption here is consistent with our earlier preemption[186] of state policies that require blocking alternatives on interstate calls different from those adopted by the Commission, and of state policies that require blocking systems that interfere with the use of *67 to achieve blocking on interstate calls.

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[185] BellSouth FNPRM Comments at 5 n. 5. BellSouth states that in Tennessee, the Public Service Commission has required BellSouth to deliver the calling party's name to the called party, even if the caller has blocked delivery of the telephone number.

[186] Report and Order at para. 69.

129. While we apply the same privacy rules to calling name and calling number, we do not believe that the same rules governing CPN transport should apply to calling name transport. Therefore, at this time we do not require that carriers pass calling party name to interconnected carriers without charge. Although the record is limited on this matter, we reach this conclusion, in part, because the mechanisms associated with the generation and delivery of calling party name and number are substantially different. The record indicates that while calling party number is routinely included in the SS7 Initial Address Message, calling party name is not.

130. Specifically, the record indicates that the costs associated with transport of the name parameter may not be *de minimis*. In contrast to caller ID service, which requires only the transmission of calling party number, to retrieve calling party name requires additional LEC/IXC interconnection and data base capabilities.[187] In order for a LEC to provide calling party name service, the calling party number must be routed to a centralized data base in which that number is associated with a calling party name. This query and information delivery requires a specific TCAP/SS7 message. After the association is made, delivery of the name is made to the terminating location.

131. Finally, while calling name service is currently offered only by a terminating LEC accessing a LEC data base, we expect that technological developments will take place, particularly in connection with increasing customer access to network functionality that may enable providers other than the LECs to offer this service. We do not wish to hamper

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[187] *See, e.g.*, Sprint FNPRM Comments at 2.

creation of competitive data bases by imposing rules regarding transport of calling name. The enhanced or basic nature of services depending on CPN was not specifically addressed in the *Further Notice*, and the comments on this point are limited. On the basis of the record before us, however, and for purposes of this proceeding, we agree with Ameritech that because calling name delivery merely provides normal telephone company record information to help the called party customer identify the calling party before answering the call, it can be considered adjunct to basic service.[188]

132. With respect to automatic call return service, we find that callers requesting that their number not be revealed should be able to block the automatic return call feature. Without this requirement, a party can use an automatic return call service to glean essential information about the calling party that the calling party wishes not to reveal. This is inconsistent with the basic tenet of our caller ID rules – that callers be allowed to keep their telephone numbers private if they choose.

133. Allowing calling parties to block automatic call return also meets the needs of special groups to prevent their telephone numbers from being revealed without their consent. For example, a victim of domestic violence staying with a friend could call home to speak with her children and even

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[188] Carriers offer basic transmission services directly to their customers as part of their common carrier service. Services based on CPN, such as calling name and call return, may be offered as common carrier services if they facilitate the customer's use of the basic transmission channel. *See, e.g., NATA Centrex Order*, 101 FCC 2d 349, 361 (1985); *North American Telecommunications Association*, 3 FCC Rcd 4385 (1988).

though she took care to block her calling party number, an abusing spouse could learn of her location by using automatic call return. The abusing spouse would not need her phone number or address, he would need only recognize the voice of the person answering the phone.

134. We believe that our privacy requirements will not unreasonably burden carriers. While we recognize that some carriers are currently offering call return service that does not enable callers to block return calls, industry standards do not require this particular configuration of the service. As the experience of other carriers currently offering call return service makes clear, the service can be offered in such a way that the caller's privacy wishes are honored. We require carriers to arrange their call return services in such a manner that callers requesting that their number not be revealed also be able to block an automatic return call feature.

B. Educational Requirements

135. *Background.* In the Further Notice, the Commission required that any common carrier participating in the offering of services providing calling party number, ANI, or charge number on interstate calls must notify its subscribers, individually or in conjunction with other carriers, that their numbers may be revealed to called parties. Notice had to be made by April 12, 1995, and such times thereafter as required to ensure notice to subscribers. Notification had to inform subscribers how to maintain privacy (i.e., by dialing *67 or 1167). For ANI services, notice had to inform subscribers of the restrictions on the reuse or sale of subscriber information.[189]

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[189] 47 C.F.R. § 64.1603.

136. *Positions of the Parties.* Several parties argue that if the Commission defers to blocking choices made by the various states, very little additional education is required. Calling parties will know the same arrangements govern interstate calls that govern intrastate calls.[190] California argues that education should be done without any marketing activity, and that carriers should be held to specific public awareness goals that can be measured.[191] Colorado urges the Commission to leave the specific requirements for education to the state commissions. Georgia Consumer Utilities Council urges the Commission to establish detailed guidelines defining the form education should take.[192] The Privacy Rights Clearinghouse urges that "privacy rights impact statements" be prepared and provided to consumers before new CPN-based services are introduced.[193]

137. A number of parties offer specific recommendations for education programs. Consumer Action urges that education be offered in a variety of languages, especially Chinese, English, Korean, Spanish and Vietnamese.[194] It recommends that the Commission require carriers to establish an independent research firm to evaluate whether eighty-five percent of low income and limited English speakers are adequately informed. TURN argues any education program must

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[190] *See* Colorado FNPRM Comments at 1; TURN FNPRM Comments at 2. (TURN states that if the Commission does not defer to state policies, extensive reeducation will be necessary. TURN FNPRM Comments at 6.)

[191] *See* California Petition at 2-3.

[192] GCUC FNPRM Comments at 3.

[193] PRC FNPRM Comments at 7.

[194] Consumer Action FNPRM Comments at 4.

be multifaceted and multilingual. It recommends notices in newspapers and announcements on radio and television, noting that not all consumers can read bill inserts.[195] It recommends that final details of any information program be left to state commissions. AT&T believes that the Commission should actively participate in the creation and coordination of customer educational materials. It recommends that the Commission convene an industry panel to develop an educational message.[196] Roseville Telephone Company supports the proposal, provided telephone companies are given the flexibility for tailoring individual messages.[197] GTE believes it would be impossible for the Commission, or any joint industry effort, to craft a uniform message that could be used in all states without confusing some subscribers.[198] Pacific rejects AT&T's call for an industry panel, but believes AT&T should share the costs of customer education with LECs. It notes IXCs benefit from passage of ANI. It says it has had experience working with IXCs to develop educational programs for 900 services, and has no objection to helping IXCs educate consumers through bill inserts or other means.[199]

138. US WEST argues there is no evidence that education campaigns already conducted, usually incorporating suggestions from state commissions and consumer advocacy groups, are deficient in scope or content.[200] It says the Commission should accord carriers substantial leeway in the

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[195] TURN FNPRM Comments at 7.

[196] AT&T FNPRM Reply at 1.

[197] Roseville Telephone Company FNPRM Comments at 4.

[198] GTE FNPRM Reply at 2.

[199] Pacific FNPRM Reply at 6.

[200] US WEST FNPRM Reply at iii.

specifics of how they speak to their customers. NECA believes the current rules satisfactorily address concerns about consumer education regarding CPN services and privacy mechanisms.[201] It argues the Commission does not usually provide detailed instruction on the form or substance of education.[202] USTA believes the current rules give a carrier the flexibility to provide notice to customers in the most effective manner given the carrier's situation.[203] Pacific argues that California has established a notification program so burdensome that no local exchange carrier in California offers caller ID services. Pacific's affiliate, Nevada Bell, does offer the service in Nevada, where it receives fewer than ten informal complaints annually. It asks that the Commission not micromanage carrier education efforts.[204]

139. *Discussion.* We agree with those parties who argue that detailed, Commission-prescribed education requirements are not necessary. Many states require education, and it is appropriate to draw on the experience that state and carrier education efforts have developed. There is no evidence in the record that these efforts have not been effective. Section 64.1603 places the responsibility for ensuring notice to subscribers that their number may be revealed to a called party on the carriers participating in calling party number, ANI or charge number services.[205] We expect carriers will adjust

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[201] NECA FNPRM Comments at 3.

[202] *Id., citing Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information*, 8 FCC Rcd 8798, 8806-7 (1993).

[203] USTA FNPRM Comments at 4.

[204] Pacific FNPRM Reply at 4.

[205] 47 C.F.R. § 64.1603

their educational messages to meet local conditions to ensure notice is effective for all blocking options, and we believe education efforts developed at the state level will provide useful guidance to carriers as they address local conditions. The rule is clear that the obligation of providing adequate notice is a continuing one. Our complaint process provides a mechanism for assuring that carriers meet their obligations.

140. The *FNPRM* invited parties to provide joint education proposals. No specific proposals have been submitted. We again encourage carriers to work together to develop effective education materials and strategies. It is in their best interest to share information about effective and efficient strategies to meet their obligations under the rules. But the obligation to develop effective education programs remains with the carriers. Each carrier has the responsibility of demonstrating that whatever means it uses are effective to inform consumers of the risks to privacy and the mechanisms available to protect it. Specifically, callers must know that unless they dial *67, CPN may be passed, and unless they dial *82, CPN may not be passed. These efforts must be completed not later than December 1, 1995 by carriers participating in the offering of services providing calling party number, ANI, or charge number services.

V. Procedural Matters

A. Ex Parte

141. The Third Notice of Proposed Rulemaking is a non-restricted notice and comment rulemaking. *Ex Parte* presentations are permitted, except during the Sunshine Agenda

period, provided they are disclosed as provided in Commission rules.[206]

B. Final Regulatory Flexibility Analysis

142. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et. seq.*, the following final analysis has been prepared:

Need for and objective of the rules:

This Second Report and Order addresses comments filed in response to the *Further Notice* concerning application of federal caller ID rules to other CPN-based services and Commission-prescribed educational requirements to support consumer use of caller ID services. We apply the CPN privacy policy to other CPN-based services so that when CPN is marked private, it is neither revealed nor able to be used to contact the caller in keeping with the basic tenet of our caller ID rules that callers be allowed to keep their telephone numbers private if they choose. We do not apply CPN transport policy to other services because the costs of using the facilities that support other services may not be *de minimis*. We further find that more detailed, Commission prescribed education requirements are not necessary at this time because ongoing carrier efforts to educate their customers about CPN services, developed in many cases with state government participation appear to be effective.

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[206] *See generally*, 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No comments were submitted in direct response to the Initial Regulatory Flexibility Analysis.

Significant alternatives considered:

The Further Notice requested comments on several issues. The Commission has considered all comments and has determined that its caller ID policies are best served by the requirement that CPN privacy policy apply so that when CPN is marked private, it is neither revealed nor able to be used to contact the caller. It does not apply the CPN transport policy to other services because the costs of using the facilities may not *de minimis*.

143. *Initial Regulatory Flexibility Act Analysis on the Third Notice of Proposed Rulemaking*

An Initial Regulatory Flexibility Analysis is contained in Appendix A.

C. Notice and Comment Provision

Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before June 30, 1995 and reply comments on or before July 28, 1995. To file formally in this proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting documents with the reference number "CC Docket 91-281" on each document. Parties wanting each Commissioner to receive a personal copy of comments, should send comments and reply comments to the

Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street, N.W., Washington, DC. Copies of comments and reply comments are available through the Commission's duplicating contractor: International Transcription Service, Inc. (ITS, Inc.), 2100 M Street, N.W., Suite 140, Washington, DC 20037 (202/857-3800).

V. ORDERING CLAUSES

144. ACCORDINGLY, IT IS ORDERED, that pursuant to authority contained in Sections 1, 4(i), 4(j), 201-205 and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, and 218, that the petitions for reconsideration and clarification of caller ID rules ARE GRANTED, except to the extent indicated otherwise herein.

145. IT IS FURTHER ORDERED that the decisions and policies adopted herein SHALL BE EFFECTIVE thirty days after the date of publication in the Federal Register.

146. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i) and (j), 201-205, 218 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i), 151(j), 201-205, and 218, that NOTICE IS HEREBY GIVEN of the proposed changes in policies regarding the application of caller ID rules to PBX systems and private payphones, and COMMENT IS INVITED on this proposal.

FEDERAL COMMUNICATIONS
COMMISSION
William F. Caton
Acting Secretary

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Rules and Polices Regarding Calling Number Identification Service – Caller ID, Memorandum Opinion and Order On Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking (CC Docket No. 91-281)

In this *Memorandum Opinion and Order*, the Commission affirms its decision to maintain a federal Caller ID policy, and will require that common carriers, including Commercial Radio Service providers, with Signaling System 7 (SS7) call set up capability must transport a calling party number (CPN) without charge to interstate connecting carriers. The *Order* also clarifies that carriers that do not have SS7 call set up capability do not have to upgrade their networks just to transport CPN to connecting customers. The decision also revises the Caller ID rules in order to permit carriers to provide privacy on all calls dialed from a particular line, where state policies provide, and the customer affirmatively selects, that option. Callers dialing *67 before dialing a particular interstate call will block calling party information for any interstate calls, and those callers using a blocked line can unblock the line and release the information by dialing *82.

I supported the Commission's prior decision to adopt a federal policy allowing only per-call blocking because I believed it would balance the primary public policy considerations in this proceeding regarding how to facilitate the interstate transmission of CPN through services including caller ID while offering individuals an opportunity to protect their

privacy.[1] At that time, I stated that the Commission would need to monitor the extent that the implementation of these rules would effectively mitigate the confusion created by the varying state practices regarding the transmission of CPN and associated blocking procedures for intrastate calls. I also was interested in monitoring how states that were currently using per-line blocking for intrastate calls would accommodate *67 blocking capability.

I support this decision on reconsideration as a continuation of the purpose underlying the prior decision, which was to: (1) establish a minimally intrusive measure given the wide variety of state practices, and (2) manage the level of confusion for consumers most effectively as compared to alternative approaches. The reconsideration record in this proceeding indicates that the modifications to the rules in this decision are appropriate to balance the public's interest in terms of the benefits resulting from transmission of CPN, as well as the respective privacy interests of both called and calling parties. This action will take another step toward mitigating the confusion resulting from the variety of state practices, while accommodating the policies of most states, including those that have maintained some form of per-line blocking. The modified policies for *67 and *82 dialing for blocking and unblocking also will offer more simple and consistent practices for callers in different states. Furthermore, to the extent that consumer education programs will be

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[1] Rules and Policies Regarding Calling Number Identification Service – Caller ID, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 1764 (1994) (Separate Statement of Commissioner Andrew C. Barrett).

necessary to ensure that consumers may make the most effective and immediate use of the practices under the modified federal policy, states will have an opportunity to design such programs to suit their unique needs.

Supreme Court, U.S.
FILED

(3)

No. 95-1514 MAR 19 1996

OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

October Term, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

VS.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II (Pages A176-A345)

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Re Contel of California, Inc.
Decision 92-06-065
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Re GTE California Incorporated
Decision 92-06-065
Application 91-01-039

134 PUR4th 184
44 CPUC2d 694

California Public Utilities Commission
June 17, 1992

BY THE COMMISSION:

INTERIM OPINION

Summary of Decision

Today we grant interim authority to Pacific Bell (Pacific), Contel of California, Inc. (Contel), and GTE California Incorporated (GTE) to provide certain new privacy related Custom Local Access Signaling Services (CLASS services or features), for a trial period of two years. We also grant authority to Pacific, Contel, and GTE for other non-privacy-related CLASS services. Rejecting the recommendation of the administrative law judge's proposed decision, we also grant the requests of applicants to provide Caller ID service, finding, provisionally, that under the terms of the

consumer protection, consumer education, and other requirements articulated in this decision, it is in the public interest and will not result in an unwarranted intrusion upon the privacy rights of California citizens.

Under the terms of our decision, Caller ID service is contingent upon each telephone subscriber having the option of selecting free per-call blocking, free per-line blocking, or free per-line blocking with per-call enabling. The default mode for subscribers who fail to make an election will be dependent upon the listed or published status of the subscriber's number. For those subscribers who currently hold unlisted or nonpublished numbers, or for certain emergency service organizations, the default mode will be free per-line blocking with per-call enabling. Free per-call blocking will be the default protection for all other subscribers.

The decision requires the deployment of a wide-ranging customer notice and education program by the applicants to facilitate universal awareness of the nature of the service and the means by which telephone users can protect their privacy and requires that such a program be submitted to CACD and approved by the Commission. Under the terms of our order, Caller ID service shall not be provided until the applicant has made a showing, approved by Commission order, that the applicant has notified all of its customers of the nature of the service and the means by which they may protect their privacy and has undertaken the steps necessary to assure that for calls initiated from private telephones in California, the display of the calling party's number to the call recipient is the result of the calling party's informed consent.

Periodic compliance and tracking reports must be filed with CACD.

While we approve interim rates with pricing flexibility, we require that each of the applicants file a new application, no later than 90 days after the issuance of the Commission's decision in the Implementation Rate Design (IRD) phase of the Commission's Alternative Regulatory Framework proceeding, Investigation (I.) 87-10-033, seeking final pricing and cost categorization in conformity with the guidelines enunciated in IRD.

Background

This consolidated proceeding originated with the filing by Pacific of Application (A.) 90-11-011, requesting authority to provide seven new COMMSTAR Custom Calling Services, Pacific's marketing term for its CLASS services. CLASS is the industry term for these services, which applicants seek to provide through deployment of a new technology, Signaling System Seven (SS7).

Pacific seeks authority to provide seven new COMMSTAR Features – Call Block, Call Return, Call Trace, Caller ID, Priority Ringing, Repeat Dialing, and Select Call Forwarding – with Category II pricing classification, including floor and ceiling rates for all proposed features, and flexible pricing and volume discounts for five of the features. It also seeks approval of new proposed rates for existing COMMSTAR Features to reflect new floor, recurring, and nonrecurring rates, a volume discount approach, and introductory pricing which would waive tariff rates for nonrecurring charges during the initial offering of COMMSTAR Features. In D.89-10-031, the Phase II decision of I.87-11-033, we identified Pacific's existing COMMSTAR Features as Category II services for pricing purposes, and, by Resolution

T-14045 (Jan. 24, 1990), we placed those features in Category II. The existing COMMSTAR Features affected by Pacific's application are Call Waiting, Busy Call Forwarding, Busy Call Forwarding Extended, Delayed Call Forwarding, Call Forwarding, Three-Way Calling, Speed Calling 8, Speed Calling 30, and Intercom Plus. The other applicants did not seek approval for flexibility of existing services.

Contel filed a similar request, A.90-12-065, seeking approval of its new Custom Calling Plus Features. It proposes to introduce seven new Custom Calling Plus Features – Call Block, Return Call, Call Trace, Caller ID, Priority Call, Repeat Call, and Selective Call Forwarding. It also requests pricing flexibility for these features.

GTE filed a comparable application, A.91-01-039, requesting authority to provide nine new SmartCall Services – Automatic Busy Redial, Automatic Call Return, VIP Alert, Call Block, Special Call Forwarding, Special Call Waiting, Special Call Acceptance, Call Tracing Service, Calling Number ID (CNID), SmartCall PAK 4400, and SmartCall PAK 4900.[1] GTE also requests pricing flexibility authorization for Category II services under Decision (D.) 89-10-031. The three applications were consolidated by Administrative Law Judge (ALJ) John S. Lemke. After conducting duly noticed public participation hearings across the state, reviewing some 3,900 letters from customers responding to the applications and to bill inserts explaining the proposed CLASS services, conducting some 21 days of evidentiary hearings and reviewing the voluminous briefs filed thereon, ALJ Lemke rendered a proposed decision which granted the authority requested, except with respect to Caller ID.[2]

We sustain the proposed decision insofar as it authorizes the CLASS services proposed by the applicants. We do not agree with the disposition of the Caller ID service contained in the proposed decision. Instead, we have concluded that the service may be offered on an interim basis, subject to the substantial consumer safeguards outlined below. We deem our order consistent with the public interest and the important privacy rights of California citizens.

As noted, the three applications are essentially similar. While we will discuss Pacific's proposal in some detail, we intend that our discussion be generally applicable to all three proposals.

Descriptions of the Products

Pacific contends that the proposed new services offer the ability to eliminate unwanted interruptions, improve the ability to complete calls, and increase options for handling abusive calls. The services will be offered to residential and business customers under a flexible pricing structure.

The proposed CLASS services are some of the products evolving from the Common Channel Signaling System 7 (SS7) technology. SS7 is an internationally standardized network management system. It allows for network and traffic management by computers, making the network more efficient and flexible. The products are made possible by the intelligence and signaling capabilities residing in SS7 and the network hardware and software technology available in the central offices. The features are available when necessary equipment is placed in interoffice facilities and central offices.

The CLASS services can be segregated into two groups. Services proposed in the first group has capabilities that can reveal the telephone number of the calling party by means of a video display on a specially designed telephone set, an audio announcement, or printed on the called party's telephone bill. The second group does not reveal the number of the calling party to the called party.

Privacy Related Class Services

Call Block

Call Block allows the customer to automatically block the receipt of incoming calls from a list of up to ten telephone numbers specified by the customer. Calls can be blocked from selected telephone numbers, or from a number from which a customer has just received a call. The Call Block subscriber can automatically add the last incoming call to his or her list by pressing #01# When this is done, the system voices back the number just added to the list, or, when per-call blocking is used by the calling party, it indicates that the last number added is a "private entry." The list of numbers may be changed by the customer at any time. Blocked callers will receive a recorded announcement stating "The party you are calling is not accepting this call." No toll charges will apply to the blocked call.

Call Return

The Call Return feature allows the subscriber to identify the number of the last person who called, unless that call is blocked as private. If the caller has requested that his number not be disclosed, the subscriber's Call Return announcement

will state: "The number of your last incoming call is a private number and cannot be announced." Otherwise, when the subscriber activates the Call Return feature, the number of the last call made to the customer's line will be announced and redialed automatically if the customer so chooses. The last caller's number, if busy, will be rechecked every 45 seconds for up to 30 minutes. Similar to Repeat Dialing, the customer will be alerted with a distinctive ring when the customer's line and busy number are free.

Call Trace

With this feature, the customer may automatically request that the company record a caller's originating number and the date and time of the call, as well as the date and time of the customer-initiated trace. The information is securely stored by the company and disclosed only to a law enforcement agency for investigation purposes.

Caller ID

The Caller ID[3] feature displays to the call recipient, on a specially designed phone or a device attached to a phone, the phone number from which the call is initiated. Customers interested in Caller ID service will need to obtain a device that displays the calling party's phone number from a retailer or other entity. If the caller has requested that his number not be displayed on the call recipient's display device, the Caller ID subscriber receiving the call will receive a "Private Number" message on his display device.

For ease of writing, the discussion of all privacy related CLASS services will be taken together and referred to as a group by the latter's name – Caller ID.

Nonprivacy Related Class Services

Priority Ringing

This service allows customers to distinguish incoming calls, from up to ten customer-prespecified numbers, by signaling the customer with a distinctive ringing pattern. If the customer also subscribers to Call Waiting, a distinctive tone is heard if an incoming call is one of the preselected set of priority numbers.

Repeat Dialing

Repeat Dialing permits the customer to have calls automatically redialed when calling a busy number. The busy line is checked every 45 seconds for up to 30 minutes. When the busy number and the customer's line are free, the customer is alerted by a distinctive ringing pattern. The customer can continue to make and receive calls while waiting for the distinctive ring.

Select Call Forwarding

This service permits a customer to forward calls from a preselected list of up to ten numbers. It can be used in conjunction with Call Forwarding. When used with Call Forwarding, the network first identifies any Select Call Forwarding numbers and routes them accordingly. Any incoming number not on the the Select Call Forwarding list will be forwarded according to the Call Forwarding instructions.

* * *

Consumer Safeguards

Blocking Options

PU Code § 2893 requires that "every telephone call identification service offered in this state . . . shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the call." Applicants propose to make available free per-call blocking, maintaining that this option satisfies the statutory blocking requirement. By entering an access code (*67)[4] before dialing any telephone number, delivery of the caller's number would be blocked for that call. The Caller ID subscriber would receive a "Private Number" message instead of the calling number on his display unit.[5]

Similarly, applicants believe that per-call blocking will protect the privacy of a caller's number when a called party subscribers to Call Block, Select Call Forwarding, and/or Priority Ringing. These features permit a subscriber to automatically add the last calling number to their feature list. If the caller activates per-call blocking, a subscriber will be permitted to add the caller's number to his list, but the number will not be disclosed. If the called party subscribes to the Call Return feature, he or she will be able to return the last incoming call even though the number is not disclosed. However, if the call is a toll call, the number returned through the use of the Call Return feature will, under the proposals submitted by the applicants, appear on the Call Return subscriber's bill.

Customer Notification and Education

Applicants propose detailed and extensive customer education plans set forth in the applications. The primary focus of the notices will be education regarding the changing nature of telephone use. To maximize the effectiveness of these notices, they will be made through the same channels that applicants will use to advertise the features, including bill inserts, targeted newspapers and magazines, radio, and television as well as a community outreach program. Applicants' notification plans include proposed bill insert language, directory instructions, and customer contact information.

Consumer Protection for "Billed to ESP" Services

Pacific has structured three of the proposed services to use a billing option referred to as "Billed to ESP." When using this option, the enhanced service provider (ESP) takes an order from the end user and places the order with Pacific for providing the services on the end user's line. The unique characteristics of the ordering require terms and conditions to protect the end user. The Billed to ESP option can be used with Call Block, Priority Ringing, and Select Call Forwarding.

ESPs and end users must understand their responsibilities for the Billed to ESP services. An ESP requesting service on behalf of an end user must warrant that they have the authority from the end user to place an order for service on the end user's line. The ESP is responsible for all ordering, including disconnects, as well as for customer education. The ESP pays the Pacific charges associated with the services provided on the end user's line. The ESP is responsible for payment of all

Bill to ESP charges, without regard to the status of the end user's line.

Pacific will send confirmation letters which acknowledge the order and any duplicative services. End users will be responsible for ordering the disconnect of potentially overlapping and/or redundant Pacific services that may exist on their line. Pacific is not responsible for charges between an ESP and the end user.

To ensure that end users are aware that services have been ordered by an ESP on their behalf, Pacific will include a one-time notice on the end user's Pacific bill under "Explanations of Other Charges and Credits." The notice will state that the service has been activated on the end user's line but is billed to its ESP.

An ESP will be required to prominently provide the following notice (which we have slightly modified from the proposed notice) on all billing for enhanced services which utilize a Billed to ESP service.

"This service is privately provided by (NAME OF ESP). Complaints regarding billing or service should be directed to (ESP ADDRESS AND TELEPHONE NUMBER). The provider of this service does pay for the use of regulated telephone facilities to provide service to you. You may inform the California Public Utilities Commission, Consumer Affairs Branch, of any unresolved problems at:

"(Northern and Southern California Commission Offices)"

Deployment Limitations

The initial deployment by Pacific is dependent upon the current availability of necessary equipment. For this reason, deployment will be introduced in stages. In stage one the new services will be available to Numbering Plan Administration (NPA) 415 (415 and 510) and 408 in Local Access and Transport Areas (LATA) 1 and 818, and 213 in LATA 5 after October 1, 1991. Stage two will expand the initial service areas to include NPAs 714 and the LATA 5 part of 805. It will also add the 707 NPA in LATA 1. Service for the second stage will begin approximately December 1, 1992.

Service will be largely, but not exclusively, limited to intraLATA calls. Wide-scale interLATA service was not expected to occur before late 1991. Any interLATA traffic will be handled by interexchange carriers. In all cases, the new features will only work when both caller and call recipient are served from capable switches interconnected by SS7 technology.

At introduction, the proposed features will not be technically compatible with the following services: Centrex, COMMSTAR II, Two-Party/Multi-Party Lines, Hotel/Motel and Hospital Lines, Manual and Direct Connections, Private Branch Exchange Service, lines served from some Remote Switching Systems, Foreign Exchange Lines, Wide Area Toll Service, and 800/900 Lines.

GTE's new CLASS features are ready for deployment now in many service areas extending from Lancaster and Montebello in the south, to Santa Maria, and also in Morgan Hill. Contel intended to deploy the new services in Gilroy in October 1991, and in its Victorville exchange service area in April 1992.

Per-Call Blocking and Caller ID Limitations

At the time the applications were filed, applicants were uncertain whether all telephone companies in other states will comply with per-call blocking requests on interLATA/interstate calls. Some interexchange companies (IECs) may not have the technical ability or business interest to receive and/or process the per-call blocking request. However, Pacific asserts it will work within a variety of national industry forums to have all companies adhere to the per-call blocking request.

Per-call blocking will only be available from telephones served from a capable switch. Callers attempting to use per-call blocking from outside the service area will receive a "reorder" signal (one which refers to a more rapid version of a busy signal indicating that the customer request could not be completed). Callers served from the capable switch will be able to use per-call blocking even for calls that travel outside the calling number delivery area.

Because of technical limitations, per-call blocking will not be available for calls from coin phones.[6] Pacific has requested switch vendors to determine when per-call blocking will be available for all coin phones. Pacific maintains, however, that since these phones are not "customer" phones within the meaning of PU Code § 2893, this switch limitation does not violate the current law.

Discussion

Caller ID

[1] We must determine whether the provision of the proposed Caller ID service is in the public interest and, if so,

whether the service can be offered to the public consistently with the privacy requirements established under state and federal law. After considering the evidence and arguments before us, we conclude that the public interest will be served by allowing the service to be offered on an interim basis for a period of two years, subject to reevaluation in light of experience. Our order is conditioned on the privacy considerations, customer education, and other requirements articulated in this decision.

Proponents of Caller ID contend that the service provides a greater degree of convenience, control, and personal security in the use of the telephone than without the service. They state that the service facilitates, *inter alia*, improved call screening and call management, the recordation of incoming calling party numbers for later use (even when the call is unanswered), the deterrence of obscene, threatening and harassing phone calls as well as calls by burglars or other parties engaged in criminal activities seeking to determine if a residence is occupied, the reduction of telephone fraud and nuisance or "junk" phone calls initiated by or against businesses or individuals, the deterrence of false alarms and bomb threats, the identification of and provision of assistance to parties in circumstances of emergency or distress, the provision of assistance to people with disabilities and to the elderly, and the preservation of evidence which may be used both in investigating crimes and at civil and criminal trials. They assert that the service will facilitate a business' processing of telephone calls from customers by speeding the retrieval of customer information and the routing of calls to customer service personnel best able to assist the customer. They state that if the service is authorized, many of these benefits will be secured by all telephone subscribers, not

merely those who subscribe to the service. Proponents also contend that most and perhaps all adverse impacts of the service on calling party privacy will be eliminated by the statutory blocking requirement.

Opponents of the service view it as being largely a marketing tool for businesses and argue that it will result in the routine infringement of calling party privacy rights. They contend that the service will facilitate the compilation, dissemination, sale, and abuse of personal information by individuals and businesses, particularly when used in conjunction with on-line directories and databases, and that it will encourage the creation and marketing of dossiers containing personal information about unwitting or unwary citizens as well as the initiation of widespread and largely unwanted telemarketing and "junk mail" campaigns. They state that the service is likely to facilitate subtle "redlining" practices involving unlawful discrimination, that it will expose victims of spousal or child abuse to undue risks of harassment and physical harm, that it will discourage the use of the anonymous crisis hotline services, such as those involving substance abuse, AIDS, rape, domestic violence, runaways, crime tips, abortion or pregnancy, suicide prevention, taxpayer assistance and the like, and that it will increase the risks of harm arising from telephone communication between professionals, such as psychiatrists, probation officers, and lawyers, and their dangerous or mentally ill clients.

Opponents also argue that the service has limited value in screening abusive or threatening phone calls because such calls are likely to be made with the calling party's number blocked or from a telephone not associated with or difficult to trace to the caller. They claim that the deterrence of such calls is likely to be as great simply by reason of the approval of

other CLASS features, such as Call Trace, and Call Return. They contend that answering machines and other CLASS services, such as Call Block, Call Return, Priority Ringing, and Call Trace, serve the purposes for which Caller ID is claimed to be useful or needed, and do so more effectively than does Caller ID. They contend that the per-call blocking option proposed by the applicants is inadequate to protect the privacy interests of California citizens, such as children, the elderly, the mentally disabled, and those whose familiarity with foreign telephone systems, whose lack of English-language skills or whose fears of technology stand as a barrier to their learning how to block effectively. And they argue that per-call blocking, which will necessitate the dialing of up to 14 digits in a split-area-code local calling area in order to block the calling party's number (*67-1-***-***-****), will be sufficiently inconvenient to chill or discourage the exercise of the calling party's free choice to block. They also argue that per-call blocking seriously undermines the privacy protections of subscribers with unlisted or nonpublished numbers who pay recurring charges for the express purpose of preserving the privacy of their telephone numbers.

There have been no formal market trials to reflect the attitudes of California customers toward CLASS services. Applicants have relied primarily upon surveys and studies conducted in Canada, New Jersey, Kentucky, and Rochester, New York, to demonstrate customer interest in the services. They indicate that they expect to sell Caller ID to less than 5% of single-line residence and business users in California.

[2] We begin our discussion by referencing California's policy for telecommunications embodied in PU Code § 709(b). That policy is "[t]o encourage the development and deployment of new technologies and the equitable provision

of services in a way which efficiently meets consumer need and encourages the availability of a wide choice of state-of-the-art services." We fully subscribe to this policy and reaffirm our commitment to assure that California citizens have a breadth of access to telecommunications and information services that is second to none.

We note that many states have authorized the provision of intrastate Caller ID service, with various conditions, and that the Federal Communications Commission (FCC) has before it a rulemaking proceeding in which it has proposed to authorize the provision of interstate Caller ID service. *See Notice of Proposed Rulemaking, In the Matter of Rules and Policies Regarding Calling Number Identification Service*, CC Docket No. 91-281, released October 23, 1991. We are reluctant to deprive California citizens of a new service which is, or will soon, be available in many jurisdictions across the country and where, at least according to the applicants, the technology involved will ultimately support a wide range of Information Age services such as home banking and mechanized information retrieval. Nevertheless, the provision of the service will significantly change the way in which the telephone is used and will place a duty to understand how the service operates on subscribers who do not purchase the service in order to protect their privacy rights. As a result, the question of whether the Caller ID service is in the public interest is a much closer one than for the other proposed CLASS services.

Balancing the arguments for and against a determination that the service is in the public interest implicates a number of significant concerns. The service involves a wide range of situations in which its availability would impose costs and confer benefits on calling and called parties. Many of these

circumstances and situations are impossible to predict without the benefit of experience. Accordingly, the overall costs and benefits of the service are not as readily ascertainable as with other proposed CLASS services. In addition, the privacy implications of authorizing the service are necessarily part of our public interest analysis. Yet those implications vary depending on the nature of the blocking options we require, the extent of the customer notice and education program we require and the way we allocate the recovery of costs as between the calling and called parties. The intrusiveness of the service on the privacy interests cannot be divorced from the *manner* in which the service is provided.

We have concluded that the public interest is served by authorizing Caller ID service on an interim basis for a trial period of two years, after which we can reevaluate our ruling in light of experience. However, for the reasons that follow, we are convinced that the service can only be offered consistently with the privacy protections and other requirements enumerated in this decision.

[3] The right of privacy establishes limits on the requirements a collective society may legitimately impose upon its individual members. It delineates a realm or zone within which individuals may exercise authority over their persons and lives without intrusion by the government or others.

Justice Louis Brandeis, in his oft-quoted dissent in *Olmstead v. United States* (1928) 277 U.S. 438, 478, described the right of privacy as "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." The Supreme Court has observed that the

right includes both an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of important decisions." *Whalen v. Roe* (1977) 429 U.S. 589, 599-600. In California our Supreme Court has identified a broad range of individual interests that have been accorded protection under the rubric of "privacy." *City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 266-68.

We fully subscribe to these sentiments. Yet we find that they frame, rather than decide, the issue before us. The affirmative use of the telephone is a somewhat problematic setting for an assertion of the right to be "let alone. . . ." One who desires solitude has a ready safe harbor in resisting the urge to reach out through the instrumentality of the telephone. Indeed, from a privacy perspective, the more apparent threat is suffered by the target of a call.[7] The person receiving a telephone call has an interest in not being imposed upon by those with whom he or she chooses not to associate.[8] This interest is not insubstantial. In a very real sense, the called party's zone of privacy (and ability to control the peaceful enjoyment of personal surroundings) is intruded upon whenever a calling party demands attention in response to the ring the telephone. And yet one may defend a perfect zone of privacy simply by deciding not to subscribe to any form of telephone service. The fact that such an alternative is not deemed practicable in an age of modern communications illustrates the degree to which all persons surrender the privacy of a hermitage as the price of living in an inter-dependent society.

If the provision of Caller ID implicates the privacy interests of both the called party and the calling party, it threatens the anonymity of the caller, previously ensured by limitations

on telecommunications technology. Yet caller anonymity has not always been the rule. In the earliest days of telephone communications a local operator connected every call. The operator was aware of the source of the attempted call as well as the intended target instrument. Mechanical switching was a technological innovation which happened to confer anonymity upon the party originating the call. No party has presented any evidence that this was an intentional consequence of political reform of the telephone service in this or any other jurisdiction. The intended consequence of the call number identification service proposed by the pending applications is a rebalancing of this equation. Because we subscribe not only to the value of the right of privacy, but also believe that it is implicated whenever a person reasonably believes that an inquisitive action has been taken, we must subject any rebalancing to a functional analysis based on teachings drawn from both constitutional and statutory sources.

[4] While the subject has received little advocacy, the privacy concerns of a called party are drawn into the debate over the public interest in the availability of a Caller ID service. For reasons which we will not elaborate, we have concluded that the privacy interest of the called party with respect to Caller ID is of lesser significance than that of the calling party. Implementation of the disputed service will result in no diminution of the called party's privacy and, indeed, will enhance it. By contrast, the expectation of anonymity which has surrounded the calling party since the advent of mechanical relay switches is directly threatened by the deployment of this new technology.

A factor to be weighed in determining the need for governmental protection is the ability of the individual citizen to guard the interest in question. In this connection, there are

self-help steps available to the called party which are neither inconsiderable in dimension nor unknown in daily life. To begin with, if the called party prefers not to hear the message or the speaker, he may hang up the telephone, just as he may turn off the radio or television or change the channel in response to an unwanted broadcast, close his door to the uninvited guest or disregard undesired mail. *See Consolidated Edison Co. v. Pub. Serv. Comm'n* (1980) 447 U.S. 530, 542; *Martin v. Struthers, supra,* 319 U.S. at 146-147. In the alternative, such a party may protect his privacy from unwanted telephone calls, as many people do, by obtaining an non-published or unlisted telephone number and controlling its dissemination.

Similarly, nothing stops a called party from screening calls or protecting privacy through the use of an answering service, an answering machine, a voice mail service or other CLASS services, such as Priority Ringing, Call Return, Call Block or Call Trace. No one obtains telephone service without subjecting himself to the risk that he will at some time receive a call he would prefer not to answer, such as a wrong number. Such an infrequent nuisance is simply a cost of having telephone service and is hardly a serious infringement of the telephone user's privacy rights.

Repeated obscene, harassing or abusive telephone calls are, of course, another matter, yet there are a number of remedies, including the other CLASS services we authorize today, for dealing with such improper or unlawful use of the telephone. Moreover, the authorization of all CLASS services, including Caller ID, will likely deter such unlawful or improper practices to a fair degree with respect to all telephone call recipients, whether or not they subscribe to the Caller ID service.

In the context of the Caller ID service, the privacy interest of the calling party is the individual's interest in controlling personal information – information which, though limited in scope, may facilitate the compilation and dissemination of additional personal information through the use of available directories and databases. Moreover, the uses to which such information may be put by the call recipient and other parties to whom the call recipient discloses it are essentially unlimited.

Several of the parties have contended that California has the most restrictive privacy laws of any state in the nation. It is not necessary that we join in this sweeping assertion in order to acknowledge that our fellow citizens place a high value on the protection of their interest in individual privacy. The constitution, statutory[9] and decisional laws of California all point to this conclusion. More directly relevant to the subject of telecommunications is the fact that more than one-third of California telephone subscribers pay a premium for nonpublished service, i.e., service which renders the subscriber's name, address, and telephone number unavailable both in the telephone directory and through directory assistance. In many metropolitan areas, the percentage of nonpublished subscribers is significantly higher. Indeed, nine of the ten areas in the nation having the largest proportion of nonpublished telephone numbers are situated in California. Our Supreme Court has recognized a reasonable expectation of privacy in nonpublished information, including telephone numbers. *See People v. Chapman* (1984) 36 Cal.3d 98, 113.[10]

In November 1972, the People of California amended Article I, Section 1, of the California Constitution to include the right of "privacy" among the "inalienable" rights of "[a]ll people." Shortly thereafter, both the goals and scope of this

amendment were considered by the California Supreme Court. *White v. Davis* (1975) 13 Cal.3d 757 featured a taxpayer's suit against the police chief of the City of Los Angeles seeking to enjoin the alleged illegal expenditure of public funds in connection with the police department's covert intelligence gathering activities which included using departmental personnel as secret informers and undercover agents. According to the complaint, such persons enrolled in classes at UCLA where, posing as students, they submitted reports to the police department of classroom discussions. (*Id.*, at 762.) The *Davis* court was unanimous in concluding that:

> " . . . the surveillance alleged in the complaint also constitutes a prima facie violation of the explicit 'right of privacy' recently added to our state Constitution. As we point out, a principal aim of the constitutional provision is to limit the infringement upon personal privacy arising from the *government's increasing collection and retention of data relating to all facets of an individual's life. . . .* " (*Id.*, at 761, emphasis added.)

In subsequent discussion, the Court declared that "the moving force behind the new constitutional provision was a more focused privacy concern relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." The ballot argument advanced by proponents of the constitutional initiative was then quoted as declaring that, "At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian." Id. R 744.[11]

It will be noted that while *Davis* and *Chapman* were decided in the context of police information gathering and surveillance activities, the ballot argument swept beyond the information gathering activities of government to embrace those of "business." The issue which we must decide is whether the privacy concerns articulated by those opposed to the deployment of Caller ID fall within the ambit of the goals articulated by the voter-approved constitutional amendment or within the further goals identified by our Supreme Court. The issue need not be decided on a "yes" or "no" basis, for it is possible for a privacy interest which was not expressly targeted for protection to be implicated by both the language and spirit of our evolving attitude toward privacy. Recognition of such an implication would then inform us of the degree to which we should condition our authorization of this service upon protective steps designed to secure an appropriate measure of privacy.

We have concluded that the authorities which speak most forcefully on the issue of privacy are directed at disciplining forces of government (especially the police) and protecting the right of citizens to engage freely in what we may term "political speech." By contrast, we have not been cited to, nor have we been able to discover, any precedent which balances the privacy interests of private parties in initiating or receiving residential telephone calls. For reasons which we shall now explain, we are not surprised at this paucity of authority, for we deem such activity to arise beyond the clear concern of privacy as a "constitutional right."

We begin with the Court's impressive teachings on the need to recognize a restraint upon the information gathering activities of government with respect to those items of personal information in which the citizen has a "reasonable

expectation of privacy." Particularly instructive is the opinion by Justice Mosk writing for the court in *Burrows v. Superior Court* (1974) 13 Cal.3d 238. *Burrows* is significant for its clear holding that a citizen's privacy right as against government intrusion is not rooted in any specific place (e.g., one's home) but extends to any circumstances which the citizen reasonably expects to lie within a realm of personal privacy. While acknowledging that federal cases have been less generous in recognition of the scope of the privacy right, the Court concluded that in California bank statements and account records are protected notwithstanding the fact that they remained in the bank's custody. Accordingly " . . . any bank statements or copies thereof obtained by the sheriff and prosecutor without the benefit of legal process were acquired as the result of an illegal search and seizure (Cal. Const., Art. I § 13) . . . " 13 Cal.3d at 245. In the same term the Court concluded that covert police surveillance in university classrooms "epitomizes the kind of government conduct which the new constitutional amendment condemns." *White v. Davis, supra,* 13 Cal.3d 757, 775. Five years later, the Court renewed its emphasis on the reasonable expectation of privacy theme. Again it spoke in the context of a criminal prosecution. In *People v. Blair* (1979) 25 Cal.3d 640, the Court concluded that the defendant had a reasonable expectation that credit card and telephone use records were private and thus protected from government intrusion absent judicial process. Building on an observation he had uttered in *Burrows,* Justice Mosk harmonized the Court's protective strategy. "No less than a bank statement, the charges made on a credit card may provide a 'virtual current biography' of an individual." 25 Cal.3d at 652.[12]

The "virtual current biography" theme was offered by the Court as a means of harmonizing prior decisions in *People v. Chapman, supra,* 36 Cal.3d 98, 105-111. The Court concluded that a California citizen who had taken the trouble to purchase an unlisted telephone number has a "constitutionally protected expectation of privacy" which was invaded when the police obtained her name and address from the telephone company without first obtaining a warrant.[13]

> "The holdings in *Burrows* and *Blair* compel one conclusion-that respondent McGee demonstrated a reasonable expectation of privacy in her unlisted name, address, and telephone number. Disclosure of her name and address to the telephone company was not volitional since it was prerequisite to obtaining a telephone. The disclosure was plainly made for the limited purpose of billing. Moreover, by affirmatively requesting and paying an extra service charge to the telephone company to keep her unlisted information confidential respondent took specific steps to ensure greater privacy than that afforded other telephone customers. Surely those steps entitle respondent to as great a degree of privacy at this court has extended to the customers in *Burrows* and in *Blair*.
>
> "[W]here "disclosure of the client's name might serve to make the client the subject of official investigation or to expose him to criminal or civil liability" (*Hays v. Wood, supra*, 25 Cal.3d at 785), the name itself may be protected by the privilege.
>
> "Here, it is the constitutional right to privacy rather than a privilege that is being invoked. However, the attorney-client privilege cases are analogous in that in both situations the government is seeking the name and address of a person about whom it already has a great deal of information. In

> many cases, it is seeking the name and address of a person in order to prove an essential link to establish a 'virtual current biography.' (*Burrows v. Superior Court, supra*, 13 Cal.3d at p. 247.) Thus, protection of the individual's name and address is the only way to protect the 'virtual current biography.' "[14]

As we have previously noted, current telecommunications technology provides anonymity to a party who elects to initiate a telephone call. Until the call is answered either personally or mechanically by the targeted number, the recipient has no means of discerning the source of the call and thus determining whether it is a welcome or obnoxious intrusion on solitude. To a greater degree than any of the other advanced calling gestures proposed by applicants, Caller ID threatens this equation. Some have urged that we recognize a constitutional right to remain anonymous and have cited decisional law containing language suggestive of such a right. We have read this cases and find that they speak to a right to engage in political speech, rather than other forms of speech, free of any government imposed condition that the speaker provide his or her name, address or other identification.[15]

In *Talley v. California* (1960) 362 U.S. 60, the Court invalidated a Los Angeles ordinance which forbade distribution, in any place and under any circumstances, any printed handbill which did not include on its face the name and address of the person who prepared, printed or sponsored it. The petitioner was arrested and tried in municipal court for distributing a handbill which urged a consumer boycott against business entities which refused "equal employment opportunities to Negroes, Mexicans or Orientals." *Id.*, at 61. While the handbill contained a reference to the "National

Consumers Mobilization," and provided the address and telephone number of that organization, the municipal court concluded that it failed to meet the requirements of the ordinance that it identify the "person" who sponsored or effected the distribution.

The Court began by invoking an historic line of cases which had held void on their face ordinances which required a government license as a precondition to the distribution of public handbills or literature. Noting that such ordinances abridged constitutionally guaranteed rights of freedom of speech and press, the *Talley* Court characterized the issues as follows:

> "The board ordinance now before us, barring distribution of 'any handbill in any place under any circumstances,' falls precisely under the ban of our prior cases unless this ordinance is saved by the qualification that handbills can be distributed if they have printed on them the names and addresses of persons who prepared, distributed, or sponsored them . . .
>
> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' (citation.)
>
> "Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either approximately or not at all . . . It is plain that

anonymity has sometimes been assumed for the most constructive purposes.

"We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. [citations.] The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it . . . is void on its fact."[16]

Eight years after *Talley*, the California Supreme Court considered the validity of an order of this Commission approving tariff schedules which required that subscribers who used the telephone system to transmit recorded messages include in the recording the name and address of the individual or organization responsible for the message. The Commission order was assailed as violative of the freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article I, Section 9 of the California Constitution. The Court, speaking through Justice Peters, agreed and annulled our order. *Huntley v. Public Utilities Commission* (1968) 69 Cal.2d 67. Drawing upon numerous decisions of the Supreme Court of the United States, the Court made the following instructive points. It concluded that freedom of speech encompasses more than simply the right to be protected from censorship of content. It extends to communication in its most fundamental sense embracing both the right to disseminate information and the right to receive it. Improper restraints on communication are offensive in that they restrict the dissemination of ideas upon which a free society is ultimately dependent. In order to guard

this free flow of ideas, those charged with the protection of constitutional rights must be sensitive to subtle as well as patent restraints imposed by governmental interference. It continued:

> "There can be no doubt that disclosure requirements may deter free speech. It must be remembered that the right of freedom of speech is primarily intended to protect minority views . . .
>
> "The majority may freely assert its beliefs and is secured freedom of speech by the very fact of its mathematical majority. It is the minority, whether of the left of the right, which must overcome accepted views. To succeed, the minority must persuade others until, as is the nature of a democratic society, it hopefully attains the status of the majority. In doing so, the minority will frequently be subjected to criticism and debate, a necessary adjunct to the ascertainment of truth. But, depending upon the popularity of the minority position and the inviolability of the majority beliefs, the proponents of change may also be subjected to harassment, threats and violence.
>
> "*In this context,* as correctly contended by petitioners, *anonymity may be an indispensable prerequisite to speech.* When the content of speech may lead to harassment or reprisal, fear or apprehension may deter expression in the first instance. History is replete with unpopular ideas which now form the foundation of modern society's mores and laws, but which could only be asserted anonymously when first expressed." Id., at 72-73. (Emphasis added.)

In contrast to cases which defend privacy interests by warding off pervasive governmental intrusion and the compilation of "virtual current biographies" of its citizens, and

apart from efforts to protect the vigorous exchange of political speech, the implementation of Caller ID posits rival privacy interests of private citizens. Thus we find instructive a line of cases which suggest a resolution of the competing rights of private citizens. Although rooted in fact patterns directly implicating the coercive power of the state, we derive guidance from the court's decisions which have balanced the constitutional privacy interest of a plaintiff who commences civil litigation to withstand the demand of a defendant for compulsory discovery. In *Britt v. Superior Court* (1978) 20 Cal. 3d 844, 859, the plaintiffs were property owners near on airport operated by the local port district. They commenced litigation against the district, asserting a diminution of property values, personal injuries, and emotional suffering occasioned by the proximity of the airport. Defendant sought to discover the plaintiffs' lifelong medical history including any treatment history for physical or emotional complaints or illness. The plaintiffs sought to resist these discovery requests by invoking their constitutional right to privacy. Defendant countered that such a right, if it otherwise obtained, had been waived with the commencement of the civil litigation. The court responded:

> " . . . while the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy, the scope of such 'waiver' must be narrowly rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities."

Accordingly, defendant's discovery rights were extended only to private matters directly relevant to the plaintiffs' claim and essential to the fair resolution of the lawsuit. The

continued vitality of this balancing approach was affirmed as recently as 1987. See *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842.[17]

From these authorities we derive the following conclusions. First, we need not resolve the dispute over a federal constitutional right of privacy or its scope in relation to telecommunications. This is because we are convinced that the explicit right of privacy established by Article I, Section 1 of the California Constitution is broader in scope than the corresponding federal right. *California v. Greenwood* (1988) 486 U.S. 35, 43-44; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252, 281; *City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130, fn.3; *Urbaniak v. Newton* (1991) 226 Cal.App.3d. 1128, 1136; *American Academy of Pediatrics v. Van de Kamp* (1989) 214 Cal.App.3d. 831, 841.[18] Accordingly, if the Caller ID service can be offered without contravening the state constitutional privacy right, *a fortiori* it does not violate federal constitutional privacy protections. Second, California's privacy protections are most intensely engaged when the threat is one of governmental gathering or compilation of information which our citizens reasonably expect to hold within a realm of personal privacy, or when there are state sponsored or sanctioned inhibitions on freedom to engage in political speech.[19] We miss a sure foothold if we fail to grasp the context in which California voters, legislators, and judges have spoken to these concerns and if we employ their sentiments to decide matters manifestly beyond their contemplation. Notwithstanding this major limitation, the "reasonable expectation of privacy" test may embrace a state of mind fostered by technological conventions. Such is the case with caller anonymity. Even more clear is the teaching of *People v. Chapman*, supra, 36 Cal.3d 98,

that a heightened expectation of privacy is to be recognized in the instance of those Californians who have taken the trouble and assumed the added cost to secure unlisted and published telephone service. To the extent that blocking options and educational efforts may redress this balance, we find no impediment to authorizing a two-year experimental deployment of Caller ID in California.

Blocking Options

As noted, the issue of whether to authorize Caller ID is inextricably linked with the issue of the manner in which the service is provided. The first inquiry we undertake is which of several blocking options should be provided. The three possible blocking options are:

1. Per-call blocking, as proposed by applicants;

2. Per-line blocking; and

3. Per-line blocking with per-call enabling.

Per-call blocking is activated by the calling party by pressing *67 on a touchtone phone before dialing, thereby blocking disclosure of the calling party's number. The Caller ID subscriber then would receive a "Private Number" message instead of the calling party's number on his or her display unit. If the calling party does not activate the *67 code, the calling party's number would be disclosed to the Caller ID subscriber. Per-line blocking precludes disclosure of the calling party's number for all calls made from a blocked access line. All parties with access lines would have a choice of per-line or per-call blocking. In per-line blocking with per-call enabling, a party could specify to the telephone

company that he or she wants all calls blocked, except those specifically unblocked by pressing a three-digit code.[20]

PU Code § 2893 requires us to assure ourselves, by rule or order, "that every telephone call identification service offered in this state by a telephone corporation . . . shall allow a caller to withhold display of the caller's telephone number, on an individual basis from the telephone instrument of the individual receiving the telephone call placed by the caller." The applicants state that this provision is intended to require per-call blocking and that such a blocking option satisfies all federal and state legal requirements.

We agree with the applicants that § 2893 may be interpreted as requiring the provision of per-call blocking. A per-call blocking option allows the caller "to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call." However, because the statute's broad and somewhat ambiguous description of a blocking mechanism fails to specify any particular blocking option, we read it requiring per-call blocking as the minimum privacy protection for the calling party's number. As we read the statute, it does not preclude us from requiring other, more restrictive blocking options to protect privacy in place of, or in addition to, per-call blocking.

Applicants argue that requiring blocking options more restrictive than per-call blocking will devalue the service. They contend that the fewer the instances in which a caller blocks the display of his telephone number, the more valuable the service will be to the Caller ID subscriber that purchases the service and to the telephone company that sells it. Even if this were true, it is not our function to create economic value

in the service by making it difficult or inconvenient for California citizens to exercise their right not to disclose their calling party numbers. If the service is to be offered consistently with constitutional guarantees and the public interest, it must be offered in a way that maximizes the ease and freedom with which California citizens may choose not to disclose their calling party numbers. We will not compromise an individual's free exercise of his or her right of privacy in order to place in the hands of the Caller ID subscriber a more valuable mailing list, a marginally better method of screening or managing telephone calls, or even a slightly more effective deterrent to unlawful or abusive uses of the telephone.

Moreover, it is by no means clear that the applicants' fears are justified. Centel Nevada has offered the service in Nevada with a choice of per-call or per-line blocking with no apparent devaluation of the service. It achieved a customer penetration rate between December 1990 and June 1991 of 5.1% – a penetration rate not significantly different than that anticipated by the applicants here. Moreover, if applicants' surveys and studies are to be credited, a substantial portion of the public sees no need to block and would presumably choose the per-call blocking option. It will be the applicants' challenge to persuade members of the public not to block by providing cogent reasons why it is not in their interest to do so. We will not assist the applicants' selling effort by infringing upon individual privacy rights.

[5] Our goal must be to ensure, to the greatest extent possible, that the decision to allow a calling party's number to be displayed is the result of informed consent and a knowing and intelligent waiver of the right of privacy. To this end, we will seek to maximize the ease and freedom with which a

caller may choose not to disclose the telephone number from which he or she is calling.

[6] We conclude that all three blocking options – per-call blocking, per-line blocking, and per-line blocking with per-call enabling – should be made available by each of the applicants and that the calling party should be permitted to choose among those options. Per-line blocking will provide protection for those who prefer not to disclose their calling party number under any circumstances and for those who need special protection. The privacy rights of subscribers with per-line blocking will not be violated as the calling party's number may not be transmitted over an access line with per-line blocking.[21]

Per-line blocking with per-call enabling will provide convenient protection for those who believe they would prefer to block their calling party number in most circumstances. There may well be circumstances in which a calling party with per-line blocking will desire to disclose his telephone number to the call recipient. Therefore, if we failed to require per-line blocking with per-call enabling as an option, subscribers desiring greater privacy protection might be discouraged from choosing per-line blocking without per-call enabling. This would create an incentive for those subscribers to choose the arguably lesser protection of per-call blocking. Thus failure to require per-line blocking with per-call enabling as an option would greatly reduce customer choice. The privacy rights of those subscribers with both per-line blocking and per-call enabling will not be violated because the calling party's number may not be transmitted unless the calling party affirmatively activates the enabling code to facilitate disclosure of his or her number. Such affirmative action manifests the calling party's informed consent to disclose his or her number

and the knowing and intelligent waiver of his or her right of privacy.

Per-call blocking will facilitate a caller's protecting his or her privacy on a selective call-by-call basis by activating the *67 code. The privacy rights of those subscribers with per-call blocking will not be violated because, in affirmatively choosing the per-call blocking option, the subscriber assumes the burden of blocking the transmission of his or her number and also assumes the risk that he or she may fail to do so.

Providing customers with these alternatives will enable us to conclude in virtually all circumstances that where the calling party's number is disclosed, the disclosure is the result of informed consent. Snce the calling party will have the choice of selecting per-line blocking, his or her choice of another option which may permit display of the calling party number in some circumstances means he or she voluntarily assumes the risk of failing to utilize the chosen option. So long as telephone subscribers are fully informed of the nature of the service and the nature of their blocking options, disclosure will be consensual and will manifest a waiver of the calling party's privacy rights.[22]

Default Blocking Options

In our view, Article I, Section 1, of the State Constitution and PU Code § 2893 require that all telephone subscribers be given the capability of blocking display of the calling party's number. We must therefore address the default blocking option that will be provided to subscribers who fail to make a

choice. Some of these subscribers may simply have determined not to exercise the right to choose, leaving that determination to the standards we announce today. Others, for reasons such as the failure to receive information about the service, language problems, or a failure to understand the nature of the service or their option to choose, may have involuntarily failed to choose.

[7] We conclude that the default blocking option for subscribers who pay for unlisted[23] or nonpublished[24] telephone numbers and who affirmatively fail to choose a blocking option must receive per-line blocking with per-call enabling. As we have noted, *People v. Chapman, supra,* 36 Cal.3d at 108, found a heightened expectation of privacy in unlisted telephone subscriber information. Thus, we think that subscribers with unlisted or nonpublished numbers who fail to make a choice should receive per-call blocking with per-call enabling as a default option. This will assure the privacy of the calling party in the absence of an affirmative act to disclose the calling party's number. Only such affirmative action will manifest the calling party's consent to the disclosure of his number.

[8] Emergency service organizations, such as police departments and shelters for battered spouses or runaways, should receive the default protection of per-line blocking with per-call enabling. We deem it unlikely that such organizations will allow the determination of a blocking option to result by default. Still, these organizations may have special and legitimate reasons, such as the facilitation of undercover investigations or the protection of persons from bodily harm, for precluding dissemination of the calling party number without an affirmative act. The applicants shall include a definition of

emergency service organizations entitled to such default protection in their tariff filings.

[9, 10] For other subscribers who fail to make a choice of blocking option, we conclude that the appropriate default blocking option is per-call blocking. The comprehensive customer notification and education program we outline below seeks to ensure that customers will be fully apprised of their options, so that a failure to make a choice will signify a determination to rely on the default options. To the extent the customer notification and education program meets its intended purpose, the privacy rights of those subscribers who receive default per-call blocking will not be infringed because the subscriber will have assumed the burden of activating the *67 code to block transmission of his or her number and will have assumed the risk that he or she may fail to do so. However, as an added protection for these subscribers, we direct the applicants, prior to offering the service, to provide each telephone subscriber with a clear and easily understandable notice informing the subscriber (1) of the blocking option applicable to that party's telephone service, (2) whether that option was determined by choice or by default, (3) of the right of the subscriber to change the blocking option applicable to that subscriber's service one time free of charge, and (4) of the nature of the available blocking options to which the subscriber might wish to change.

All telephone users should be aware that with respect to telephones other than the customer's, any of the three blocking options may be involved. The blocking option applicable to a particular telephone will reflect the choice of the subscriber purchasing that service. Telephone users will therefore have to ascertain the nature of the option applicable to a

particular telephone in order to assure that they are effectively blocking the calling party's number. We direct the applicants to ensure that there is a simple means of identifying the nature of the blocking option applicable to a particular telephone and that the public is fully informed of this means. Such a means might include a recorded message when access codes inappropriate to the relevant blocking option are undertaken, or the absence of a second dial tone either when the *67 code is entered on a line-blocked phone or when the per-call enabling code is entered on a phone not programmed for that option. The applicants should attempt to agree on the best means from the consumer's perspective, taking into account simplicity and reliability, and should attempt universal deployment of that means and a wide-ranging effort to publicize it. Information regarding the means of identifying the blocking option applicable to a particular telephone should be included in the customer notification and education program.

The record in this case suggests that coin phones and certain other configurations,[25] at least for the present, will not be capable of utilizing blocking. The applicants should widely publicize this fact and should undertake to ensure that all coin phones, and other blocking-incompatible configurations, under their control have affixed to them a notice informing the user that blocking of the calling party's number is not currently possible from that phone.[26]

Charge for Blocking Options

[11] We conclude that each of the blocking options shall be provided free of charge to the subscriber for the initial selection (whether by affirmative choice or by default) and for one additional change of blocking option.[27] The

applicant shall take steps to assure that any such change order is processed and effected expeditiously. If the subscriber should desire additional changes of blocking options, the applicant may impose a nonrecurring charge for each such change order not to exceed cost. PU Code § 2893(b) provides that "[t]here shall be no charge to the caller who requests that his or her telephone number be withheld from the recipient of any call placed by the caller." We think the provision of the initial selection and one change free of charge exceeds the statutory requirement. Moreover, we view this approach as consistent with our desire not to impose a cost on the exercise of the right of privacy by California citizens.

* * *

Findings of Fact

1. Applicants (Pacific, GTE, and Contel) have requested authority to provide several new CLASS features, as well as approval of rates and Category II pricing classification for those services, including floor and ceiling rates and flexible pricing for several of the services, and volume discount pricing therefor.

2. Pacific's application covers seven new COMMSTAR Custom Calling Services (Call Block, Call Return, Call Trace, Caller ID, Priority Ringing, Repeat Dialing, and Select Call Forwarding).

3. Contel's application covers the following new Custom Calling Plus Features: Call Block, Return Call, Call Trace, Caller ID, Priority Call, Repeat Call, and Selective Call Forwarding.

4. GTE's application covers nine new SmartCall Services (Automatic Busy Redial, Automatic Call Return, VIP Alert, Call Block, Special Call Forwarding, Special Call Waiting, Special Call Acceptance, Call Tracing Service, Calling Number ID (CNID), SmartCall PAK 4400, and SmartCall PAK 4900).

5. The industry term for these new services is CLASS, and applicants seek to provide these services through deployment of a new technology known as Signaling System Seven (SS7), which is an internationally standardized network management system allowing for network and traffic management by computers.

6. While each applicant has used distinctive product names in packaging its CLASS services, consumers would be well served if applicants would agree among themselves on a single and fairly descriptive name for the corresponding offerings to be provided in this state.

7. Pacific also requests approval of new proposed rates for its existing COMMSTAR Features to reflect new floor, recurring and nonrecurring rates, a volume discount approach, and introductory pricing which would waive tariff rates for nonrecurring changes during the initial offering of COMMSTAR Features; the other applicants do not seek approval for flexibility of existing services.

8. D.89-10-031 established certain categories with respect to pricing policy, and determined that Category II should include discretionary or partially competitive services for which LECs retain significant market power. The decision provided that Category II services may be flexibly priced, and that rate floors therefor should be based on direct-embedded costs.

9. The CLASS features sought to be offered by applicants in these proceedings are discretionary and/or partially competitive, and properly included in Category II. The price floors developed for the proposed CLASS and existing COMMSTAR services reflect the direct-embedded costs applicable to each feature, as well as those costs applicable on the volume discount bases requested by applicants.

10. The Caller ID feature displays to the call recipient, on a specially designed phone or a device attached to a phone, the phone number from which the call is initiated.

11. If the caller has requested that his/her number not be displayed on the call recipient's display device, the Caller ID subscriber receiving the call will receive a "Private Number" message on the display device.

12. There have been no formal market trials to reflect the attitudes of California customers toward CLASS services, and applicants have relied upon surveys and studies conducted in Canada, New Jersey, Kentucky, and Rochester, New York, to demonstrate customer interest in these services; applicants expect to sell Caller ID to less than 5% of single-line residence and business customers.

13. California's telecommunications policy encourages the development and deployment of technologies and the equitable provision of services in order to efficiently meet customer needs and encourage the availability of a wide choice of state-of-the-art services.

14. The Commission is committed to assuring that Californians have a breadth of access to telecommunications and information services that is second to none.

15. Caller ID service, however, will significantly change the way the telephone is used and will impose upon subscribers who do not purchase the service a duty to understand how the service operates in order to protect their privacy rights; the question of whether Caller ID is in the public interest is a much closer one than for the other proposed CLASS services.

16. The privacy concerns of a called party are drawn into the debate over the public interest and availability of Caller ID; however, these concerns are less directly threatened than the privacy interests of the calling party.

17. Experience since the implementation of the mechanical switching has furnished the caller anonymity without according the called party any added measure of protection for his/her right to be let alone.

18. The privacy interest of the called party with respect to Caller ID is less significant than the interest of the calling party, because if we were to authorize the Caller ID service, the called party's privacy would be protected no less than it presently is protected without the service.

19. The expectation of anonymity which has surrounded the calling party since the advent of mechanical relay switches is directly threatened by Caller ID.

20. The privacy interests of the calling party is to control personal information – information which, though limited in scope, may facilitate the compilation and assimilation of personal information through the use of available directories and databases; the uses to which such information may be put by the call recipient and other parties to whom the call recipient discloses it are essentially unlimited.

21. The constitution, statutory, and decisional laws of California demonstrate that Californians place a high value on the protection to their interest in individual privacy.

22. More than one third of California telephone subscribers pay a premium for nonpublished service, i.e., service which renders the subscriber's name, address, and telephone number unavailable both in the telephone directory and through directory assistance.

23. Current telecommunications technology provides anonymity to a party who elects to originate a telephone call; however Caller ID threatens this equation.

24. As opposed to defending privacy interests against pervasive government intrusion, and apart from efforts to protect the vigorous exchange of political speech, the implementation of Caller ID requires the balancing of the rival privacy interests of private citizens.

25. If Caller ID service is authorized without strict consumer safeguards, there will be a risk that the calling party's privacy rights will be infringed.

26. A heightened expectation of privacy is to be recognized in the case of those Californians who have assumed the added cost of securing unlisted and nonpublished telephone service.

27. To the extent that blocking options and educational efforts may adequately balance the rival privacy interest of private citizens, this Commission finds no impediment to authorizing a two year experimental deployment of Caller ID in California; however the Caller ID service can only be offered if it is offered consistently with the consumer safeguards and other requirements enumerated in this decision.

28. It serves the public interest to authorize the provision of the Caller ID service on an interim basis for a trial period of two years, after which the Commission can reevaluate the service in light of experience.

29. Per-call blocking is activated by the calling party by pressing *67 on a touchtone phone before dialing, thereby blocking disclosure of the calling party's number.

30. Per-line blocking precludes disclosure of the calling party's number for all calls made from a blocked access line.

31. In per-line blocking with per-call enabling, a party may specify that he/she wants all calls blocked, except those specifically unblocked by pressing a three-digit code.

32. If Caller ID is to be offered consistently with constitutional guarantees and the public interest, it must be offered in a way that maximizes the ease and freedom with which Californians may choose not to disclose their calling party numbers.

33. Our goal is to ensure, to the greatest extent possible, that the decision to allow a calling party's number to be displayed is the result of informed consent and a knowing and intelligent waiver of the right of privacy.

34. All three blocking options – per-call blocking, per-line blocking, and per-line blocking with per-call enabling – should be made available by each of the applicants, and the calling party should be permitted to choose among these options.

35. Per-line blocking will provide protection for those who prefer not to disclose their calling number under any circumstances and for those who need special protection.

36. Per-line blocking with per-call enabling will provide convenient protection for those who believe they would prefer to block their calling party number in most instances.

37. The failure to offer per-line blocking with per-call enabling as an option would greatly reduce customer choice, as those desiring greater privacy protection might be discouraged from choosing per-line blocking without per-call enabling due to the inflexibility of that option.

38. The privacy rights of customers who choose per-line blocking and per-call enabling will not be violated because the calling party's number may not be transmitted unless the calling party affirmatively activates the enabling code; such affirmative action manifests the calling party's informed consent to disclose his/her number and the knowing and intelligent waiver of his/her right of privacy.

39. The privacy rights of those subscribers who choose per-call blocking will not be violated because, in affirmatively choosing the per-call blocking option, the subscriber assumes the burden of blocking the transmission of his/her number and assumes the risk that he/she may fail to do so.

40. Article I, Section 1, of the State Constitution and PU Code § 2893 require that all telephone subscribers be given the capability of blocking display of the calling party's number, and therefore require adoption of a default blocking option.

41. Those who pay for unlisted or nonpublished telephone numbers, and who affirmatively fail to choose a blocking option, must receive per-line blocking with per-call enabling; this is consistent with a heightened expectation of privacy in unlisted telephone subscriber information.

42. Emergency service organizations, as defined in applicant's tariffs, may have special and legitimate reasons for precluding dissemination of the calling party's number without an affirmative act; these reasons justify providing such organizations with the default protection of per-line blocking with per-call enabling.

43. Other subscribers who fail to make a choice of blocking option following the comprehensive customer notification and education program and the additional advance notice requirements specified in this decision, must receive per-call blocking.

44. Because subscribers who receive per-call blocking as a default option will have been notified that they must activate the *67 code to block transmission of the calling number, it is reasonable to conclude that such subscribers have assumed the risk for failure to activate the code.

45. The use of Caller ID service by a subscriber who possesses the capability of receiving the calling party's number *only* because he/she has lawfully purchased the service from "a provider of electronic or wire communication service" pursuant to a duly authorized tariff satisfies the exceptions of 18 U.S.C. Section 3121(b); we perceive no violation of the Federal Wiretap Law in our authorization of Caller ID service.

46. In view of the manner in which we are authorizing Caller ID service, there is no violation of California penal statutes prohibiting the wiretapping, interception, eavesdropping on and recordation of confidential communications over the telephone.

47. The evidence of "redlining" implications of Caller ID service is largely speculative; however we will monitor the situation closely in accordance with the provisions of this order.

48. A charge of $5 for each activation by Pacific and Contel for providing Call Trace will reflect the direct-embedded costs incurred when providing such service, and is a reasonable charge. A cap equal to the charge for two activations from the same calling number in a billing period is also reasonable in connection with Call Trace service provided by Pacific and Contel, as is a charge equal to the charge for five activations from all numbers in the same billing period. A flat monthly charge of $5 by GTE for Call Trace will be reasonable, since GTE is technically unable to currently provide the service on a per-activation basis.

49. Call Return involves delivering to the party making a return call, the telephone number of the original calling party on the monthly billing statement, if made as a toll call; in circumstances where the Call Return service is utilized to place a return call to a party who called from a blocked number, and a toll charge for the return call is placed on the bill, the last four digits of the blocked number should not be disclosed, in the interests of privacy protection.

50. The CNEPs submitted with the applications involve principally the provision of Caller ID, and are not necessary in connection with the other CLASS features. However, customer notification and instruction in connection with Call Trace would be particularly beneficial because of the potential benefit associated with that service.

51. Issues involving unbundling, nondiscriminatory access, and imputation are being addressed in the IRD phase

of the Commission's Alternative Regulatory Framework proceeding, I.87-10-033.

52. In the agreement (Exhibit 13) between MCI, Pacific, and DRA, Pacific is required to furnish supporting workpapers demonstrating that price changes between adopted floor and ceiling prices protect price floors. The agreement also provides that Pacific demonstrate in the IRD proceeding that rates and charges for new COMMSTAR Features comply with Commission-adopted principles for unbundling, imputation, nondiscriminatory access, and MBBs, as set forth in D.89-10-031, and that if the Commission establishes different rules for unbundling, etc. in IRD, Pacific shall modify its rates for COMMSTAR services as part of that proceeding.

53. The agreement contains ample safeguards to insure that price floors will be observed, and that any proposed changes will protect those floors. Neither MCI or monopoly ratepayers will be harmed by our granting interim authority in this decision to provide the proposed COMMSTAR services, with pricing flexibility, until the unbundling, etc. issues are resolved in the IRD proceeding.

54. Pacific has requested Category II classification with pricing flexibility for all CLASS features except Caller ID and Call Trace. GTE and Contel have requested Category II classification with pricing flexibility for all proposed CLASS features, except that GTE has amended its original position and indicated that Call Trace could be placed in Category I.

55. GTE proposes to assess a charge for uncompleted calls in connection with Special Call Acceptance; such a charge would not be appropriate.

56. A charge of $2.50 for GTE's service of Special Call Acceptance will cover its floor price when GTE does not charge for uncompleted calls.

57. The charge of $40 assessed by Contel for service connection includes the cost of processing requests for CLASS features, and covers Contel's direct-embedded costs.

58. SS7 costs have been incurred by applicants with the intent to benefit the present and future basic rate infrastructure, as well as to enable the deployment of present and future CLASS-type infrastructure requiring the use of SS7. As such, the cost of SS7 is not directly attributable only to present CLASS features.

59. The direct-embedded cost methodology for calculating SS7 costs, and the cost allocation methodology utilized by applicants is appropriate for purposes of this proceeding.

60. Pacific recommends a tracking procedure in connection with the provision of CLASS services requiring the following:

> a. Total CLASS-flexible pricing revenues and unit sales volume results on a semi-annual basis;
>
> b. Unit costs to be provided annually, and include recurring and nonrecurring costs, plus a description of extraordinary marketing and advertising costs; and
>
> c. The number of informal complaints received, if any, for CLASS features on a semi-annual basis.

61. The tracking procedure recommended by Pacific will provide data adequate to insure that the demand and cost estimates used by applicants in formulating their cost and

price levels for CLASS are realistic, and protect floor prices applicable in connection with each CLASS feature.

Conclusions of Law

1. Subject to the requirements of this decision, the applicants should be authorized to provide the CLASS features as requested and described in the applications.

2. The floor, initial, and ceiling rates proposed by applicants for the existing and proposed CLASS features are reasonable for the present, and should be authorized, with pricing flexibility, on an interim basis. Final rates for these features should be determined based upon the guidelines adopted in IRD relating to unbundling, nondiscriminatory access, imputation, and the definition of MBBs, as well as how to impute tariffed rates of MBBs into tariffed CLASS features.

3. Article I, Section 1, of the California Constitution explicitly establishes the right of privacy as an inalienable right of all people.

4. The authorities which speak most forcefully on the issues of privacy are directed at disciplining forces of government (especially the police) and protecting the rights of citizens to engage freely in "political speech."

5. The issues posed by balancing privacy interests of private parties who initiate or receive residential telephone calls arise beyond the clear concern of privacy as a "constitutional right."

6. California case law upholds the need to restrain the information activities of government with respect to those

items of personal information wherein the citizen has a "reasonable expectation of privacy."

7. While some have urged that Caller ID implicates a constitutional right to remain anonymous, the authorities they cite refer to a right to engage in political speech free of any government imposed condition that the speaker provide his/her name, address, or other identification.

8. Freedom of speech encompasses more than the right to be protected from censorship of content. It extends to communication in its most fundamental sense embracing both the right to disseminate information and the right to receive it.

9. Improper restraints on communications are offensive because they restrict the dissemination of ideas upon which a free society is ultimately dependent.

10. Because the right of the freedom of speech is intended to protect minority views, anonymity may be an indispensable prerequisite to speech.

11. The explicit right to privacy established by Article I Section 1 of the California Constitution is broader in scope than the corresponding federal right; therefore, if Caller ID can be offered without contravening the state constitutional privacy right, it does not violate federal privacy restrictions.

12. While California's privacy protections are most intensely engaged when the threat is one of governmental gathering or compilation of information in which citizens have a reasonable expectation of privacy, or when there are state sponsored or sanctioned inhibitions on freedom to engage in political speech, the "reasonable expectation of privacy" test advanced by the court may embrace a state of

mind fostered by technological conventions. Such as the case with Caller ID.

13. PU Code § 2893, which requires that we assure ourselves "that every telephone call identification service offered in this state by a telephone corporation . . . shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call placed by the caller," may be interpreted as requiring the provision of per-call blocking; however the statute fails to specify any particular blocking option, and the therefore is interpreted as requiring per-call blocking as the minimum privacy protection for the calling party's number.

14. Pursuant to PU Code § 2893, this Commission may require more restrictive blocking options to protect privacy, in place of, or in addition to, per-call blocking.

15. Article I, Section 1, of the State Constitution and PU Code § 2893 require that all telephone subscribers be given the capability of blocking display of the calling party's number, and therefore require adoption of a default blocking option.

16. The provision of the initial blocking selection and one change free of charge exceeds the requirement set for the in PU Code § 2893(b), which provides that "[t]here shall be no charge to the caller who requests that his or her telephone number be withheld from the recipient of any call placed by the caller."

17. In view of the manner in which we are authorizing Caller ID service, there is no violation of California penal

statutes prohibiting the wiretapping, interception, eavesdropping on and recordation of confidential communications over the telephone.

18. Applicants' requests to provide Caller ID service should be granted on an interim basis, subject to the consumer safeguards and other requirements contained in this decision.

19. Pacific and Contel should be authorized to provide Call Trace service at a charge of $5 per activation, subject to a price cap equal to the charge for two activations from the same number in a billing period, and to a cap equal to the charge for five activations from all numbers in the same billing period. GTE should be authorized to provide Call Trace service at a charge of $5 per month. Applicants should provide customers notice and education regarding Call Trace consisting at least of bill insert information concerning the availability and applicability of the service. A copy of the proposed bill inserts and any additional materials should be furnished to and approved by the Commission's Public Advisor.

20. In connection with the service of Call Return, applicants should be required to withhold delivery of the original calling number from the monthly billing statements of subscribers to the service.

21. GTE should not be authorized to assess a charge for uncompleted calls in connection with Special Call Acceptance. GTE should be authorized to assess a charge of $2.50 for this service.

22. The service connection charge of $40 proposed by Contel should be approved on the basis of it's including the provisions of CLASS features.

23. The direct-embedded cost methodology for calculating SS7 costs, and the cost allocation methodology therefor utilized by the applicants should be approved.

24. The tracking procedure outlined in this decision should be approved for monitoring the CLASS services authorized pursuant to this decision. Applicants' first reports should be filed one year after commencement of the services.

25. The Motion of Pacific to strike portions of the DRA opening and closing briefs should be granted.

26. MCI's Motion Requesting Declaratory Ruling or Other Relief should be denied.

27. TURN's Motion for Official Notice of Recent Decisions of Other Commissions Regarding Caller ID and Pacific's related motion should be denied.

28. TURN's Motion for Sanctions should be denied.

INTERIM ORDER

IT IS ORDERED that:

1. Pacific Bell (Pacific), GTE California Incorporated (GTE), and Contel of California, Inc. (Contel) are authorized to provide the existing and proposed nonprivacy-related Custom Local Access Signaling Services (CLASS) features identified in the applications, on five days' notice; except that for a limited two-year trial period, Pacific, GTE, and Contel are authorized to provide privacy-related CLASS services (Call Return, Call Block, Call Trace, and Caller ID) on an interim basis, subject to the protections specified in this order for such privacy-related services. Pacific is authorized to provide

existing COMMSTAR services in accordance with the terms and conditions of this decision.

a. Tariffs implementing Call Trace shall not become effective until applicants have provided customers notice and education concerning the service, and shall be filed in accordance with the rates and conditions set forth in Conclusion of Law 19.

b. GTE is authorized to file rates for Special Call Acceptance in accordance with Conclusion of Law 21.

c. Applicants may file tariffs for the remaining services as set forth in the proposed tariffs in their respective applications.

2. Prior to offering Call Return, Call Block, Call Trace, and Caller ID service, applicants shall provide each telephone subscriber with a clear and easily understandable notice informing the subscriber (1) of the blocking option applicable to that party's telephone service, (2) whether that option was determined by choice or by default, (3) of the right of the subscriber to change the blocking option applicable to that subscriber's service one time free of charge, and (4) of the nature of the available blocking options to which the subscriber might wish to change.

3. Prior to offering Call Return, Call Block, Call Trace, and Caller ID service, the applicants shall ensure that there is a simple means of identifying the nature of the blocking option applicable to a particular telephone and that the public is fully informed of this means. The applicants should attempt to agree on the best means from the consumer's perspective, taking into account simplicity and reliability, and should attempt universal deployment of that means and a wide-ranging effort to publicize it. Information regarding the

means of identifying the blocking option applicable to a particular telephone shall be included in the customer notification and education program.

4. Prior to offering Call Return, Call Block, Call Trace, and Caller ID service, the applicants shall widely publicize the fact that coin phones and certain other configurations, at least for the present, will not be capable of utilizing blocking, and shall undertake to ensure that all coin phones under their control have affixed to them a notice informing the user that blocking of the calling parties' number is not currently possible from that phone.

5. Each of the blocking options shall be provided free of charge to the subscriber for the initial selection (whether by affirmative choice or by default) and for one additional change of blocking option, and the applicants shall take steps to assure that any such change order is processed and effected expeditiously.

6. Call Return, Call Block, Call Trace, and Caller ID service shall not be provided until the applicants have filed (and served) revised customer notification and education plan(s) to be reviewed by the Commission Advisory and Compliance Division (CACD) (in consultation with the Public Advisor and, if necessary, an independent consultant chosen by CACD and paid for by applicants), and such plan(s) shall not be implemented until approved by the Commission. Subsequently, such privacy-related CLASS services shall not be provided until the applicants have made a showing in this proceeding, approved by Commission order, indicating compliance with the adopted customer notification and education requirements. An appropriate customer notification and education plan for the following CLASS services (Caller ID, Call

Block, Call Trace, and Call Return) must conform to the following requirements:

a. Complete information shall be provided to all California ratepayers, not simply those in areas where the service is currently offered.

b. Additional efforts shall be made in the new areas where the services will be offered, as they are added by the local exchange carriers.

c. The consumer education campaign shall be most intensive in the first six months and then ongoing for as long as the services are being offered.

d. All utility consumer education efforts shall use the same terminology and be as similar as possible.

e. Customer messages ordered by this decision shall not be sales messages. They shall provide objective, neutral information on both the services themselves and how consumers can make informed choices about these changes.

f. Written messages shall state that they are provided by the local exchange carrier as required by the Commission.

g. The messages shall be provided in many languages, so as to reach all Californians. The media used in the plan shall include, but not be limited to, the following: bill inserts, white pages information, brochures, sales representative scripts, and paid advertising.

h. The plan shall make extra efforts to reach groups with special needs (such as seniors, children, the limited English speaking, the disabled, those with nonpublished numbers).

i. The utilities shall establish a 24-hour toll free number for consumers to get information about the services and how they are used.

j. The messages shall tell consumers whom to contact if they have complaints about the way the service is being implemented (first the local exchange carrier, then the Commission's Consumer Affairs Branch.

k. Ordering per-line blocking or per-line blocking with per-call enabling shall be as simple as possible. A request form shall be included with the information/education material.

l. The codes used for per-call blocking shall be distinctly different than those for per-call enabling.

m. The local telephone companies offering any services shall provide the following information to the Commission Advisory and Compliance Division in a periodic compliance report to be filed with the Director of the CACD every six months after the services are offered:

(1) Number of subscribers to each CLASS service.

(2) Number of subscribers choosing per-call blocking.

(3) Number of subscribers choosing per-line blocking.

(4) Number of subscribers choosing per-line blocking with per-call enabling.

(5) Number of subscribers assigned default per-line blocking with per-call enabling.

(6) Number of subscribers assigned default per-call blocking.

(7) Number of subscribers ordering a change from initial blocking option, broken down by option changed from and option changed to.

(8) Number of subscribers with unlisted and unpublished numbers with a breakdown of those subscribers by choice of blocking option.

(9) Number of subscribers with unlisted and unpublished numbers assigned default per-line blocking with per-call enabling.

(10) Number and nature of complaints concerning the service.

n. Within 18 months of the date that the local telephone companies first provide the service, they shall serve and file with the Docket Office the interim compliance report required by this decision. This report shall address in detail (1) the level of usage of the services, (2) the effectiveness of the privacy protections and education programs implemented under this decision, (3) the nature of the public response to the provision of the services, (4) whether there have been new developments which militate in favor of discontinuance or alteration of the services, and (5) any other matter relating to the services which the applicant desires to call to the Commission's attention. A copy of that report shall be served on all parties to this proceeding. Parties shall have 30 days in which to file responses.

o. Consistent with PU Code § 2893(c)(1), the companies shall not offer the services until more than 30 days after they have notified their customers of the nature of the services they propose to provide.

p. Consistent with the spirit of PU Code § 2893(d)(4), the companies' education efforts shall include information to the effect that under their current terms of service, telephone users may be communicating their calling party number to private businesses every time they call an 800 or 900 number through a service known as Automatic Number Identification (ANI), that there is at present no capability to block the communication of their calling party number through ANI, that many businesses receiving ANI have the software capability to call up on-screen database information about the calling party at the time of the telephone call, and that these facts have not been well publicized.

q. The messages shall make consumers aware of the effectiveness of all blocking options when making interstate calls.

r. In their tariff filings, the applicants shall include a definition of "emergency service organizations" entitled to default protection of per-line blocking with per-call enabling.

7. In developing the customer notification and education plan, the applicants shall consult extensively with community and consumer leaders; applicants shall hold workshop(s) which will be open to all those interested, to review and comment on the plan prior to filing; we expect that applicants will modify their draft to reflect comments received, prior to filing. The plan shall not be implemented until approved by the Commission.

8. Call Return, Call Block, Call Trace, and Caller ID service shall not be provided by an applicant until the applicant has made a showing, approved by the Commission, that the applicant has notified all of its customers of the nature of

the service and the means by which they can protect their privacy, consistent with the provisions of this order.

9. Applicants shall contract with a reputable independent public opinion survey company free of conflict of interest to monitor the ongoing level of consumer awareness and understanding that has been attained during the period extending from the date of this decision to the date of expiration of the two-year trial period established herein.

10. Should we find that the utilities' implementation proves to be inadequate for any reason, we may supplement the customer notification and education plans with the program administered by the Commission Advisory and Compliance Division (CACD).

11. We direct CACD to closely monitor any complaints of "redlining" or unlawful discrimination through the use of Caller ID service, and to bring the problem to our attention along with recommendations as to how any such practices can be eliminated or controlled as necessary.

12. Call Trace shall be the subject of bill insert information and instruction to consumers.

13. GTE shall not offer Call Return until it has made the modifications to its hardware and software systems, including its billing system, necessary to suppress the calling parties' billing number on Call Return calls.

14. The privacy-related CLASS features other than Caller ID are authorized subject to the limitation that calling party numbers not be delivered or announced to call recipients.

15. Final rates for the existing and proposed features identified and authorized in this decision will be established

based upon the determinations made in the Implementation Rate Design (IRD) phase of the Commission's Alternative Regulatory Framework proceeding, (I.) Investigation 87-10-033, regarding unbundling, imputation, nondiscriminatory access, and monopoly building blocks (MBBs).

16. Within 90 days after issuance of the decision in the IRD phase of the Commission's Alternative Regulatory Framework proceeding, I.87-10-033, regarding unbundling, imputation, nondiscriminatory access, and MBBs, Pacific, GTE, and Contel shall file advice letters, with appropriate rates, for the services authorized by this decision.

17. The Motion of Pacific to strike portions of the opening and closing briefs of the Division of Ratepayer Advocates is granted.

18. The Motion of MCI Requesting Declaratory Ruling or Other Relief is denied.

19. The Motion of Toward Utility Rate Normalization requesting notice of recent decisions of other Commissions relating to Caller ID and Pacific's related motion, are denied.

20. The first tracking report, as described in Finding of Fact 72, shall be submitted to the Commission 6 months after commencement of the proposed services.

21. The applications are granted, in part, and denied, in part, as set forth above.

This order is effective today.

Dated June 17, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

I will file a written concurring opinion.
/s/ JOHN B. OHANIAN
Commissioner

I will file a written concurring opinion.
/s/ NORMAN D. SHUMWAY
Commissioner

* * *

Norman D. Shumway, Commissioner, concurring:

[22] I concur in part with the result reached by the Commission in this case. I believe that it properly permits an offering of CLASS services consistent with the public interest and adopts sufficient safeguards to assure that the privacy rights of California citizens will not be infringed. I write separately, however, to express my view that we need not pronounce limitations or adopt a narrowing construction of Article I, § 1, of the California Constitution in order to reach the result we do in this case.

In this decision my colleagues conclude that "California's privacy protections are most intensely engaged when the threat is one of governmental gathering or compilation of information which our citizens reasonably expect to hold within a realm of personal privacy, or when there are state sponsored or sanctioned inhibitions on freedom to engage in

political speech." Mimeo op., at 33-34 (footnote omitted); *see also id.*, at 25, 28, 31. This emphasis, suggesting a distinction between violations of privacy by the government and violations by private parties, in my opinion, is misplaced.

In *White v. Davis* (1975) 13 Cal.3d 757, 774-75, the California Supreme Court made clear that the state constitutional right of privacy was enacted to restrain the information-gathering activities of "government *and business*." The decisions of the California Court of Appeal have consistently read *White* as establishing that nongovernmental parties may be found to violate the constitutional right of privacy. *Park Redlands Covenant Control Committee v. Simon* (1986) 181 Cal.App.3d 87, 98 ("[T]here is both Supreme Court and appellate authority to the effect that state action is not required to create a violation of the California Constitutional right of privacy."); *Luck v. Southern Pacific Transp. Co.* (1990) 218 Cal.App.3d 1, 19; *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1094; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1040.

In addition, many appellate decisions have found violation of the state constitutional right of privacy by private parties, including individuals, to be an actionable tort. In *Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, for example, the court stated:

> The constitutional right of privacy is self-executing; hence, it confers a judicial right of action on all Californians. . . . Privacy is protected not merely against state action; it is considered an inalienable right *which may not be violated by anyone.*

Id., at 829-30 (emphasis added); *accord, Luck, supra*, 218 Cal.App.3d at 19; *Semore v. Pool, supra*, 217 Cal.App.3d at

1094; *Wilkinson v. Times Mirror Corp., supra,* 215 Cal.App.3d at 1042-43; *Cutter v. Brownridge* (1986) 183 Cal.App.3d 836, 842; *Park Redlands, supra,* 181 Cal.App.3d at 98; *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 851; *Kinsey v. Macur* (1980) 107 Cal.App.3d 265, 272; *see also Chico Fem. Women's Health Center v. Butte Glenn Med. Society* (E.D.Cal. 1983) 557 F.Supp. 1190, 1201-03.

While these decisions have been rendered by the Court of Appeal, the Supreme Court has not elected to order any of them depublished pursuant to Rules of Court 976 and 979. In fact it has ratified several of them, at least to the extent of citing them for other propositions. *See, e.g., Tavernetti v. Superior Court* (1978) 22 Cal.3d 187, 195 (involving the interception of a telephone communication by a telephone company linesman), which cites *Porten* with approval.

True, in *Schmidt v. Superior Court* (1989) 48 Cal.3d 370, 389, fn. 14, our Supreme Court, citing *Porten*, stated that it had "no occasion in this case to consider under what circumstances, if any, purely private action by a property owner or landlord would constitute a violation of the state constitutional privacy provision." But as two subsequent Court of Appeal decisions found after exhaustively discussing the *Schmidt* footnote, the availability of redress for nongovernmental violations of the constitutional right of privacy is the law of California. *Semore v. Pool, supra,* 217 Cal.App.3d at 1084, *quoting Wilkinson v. Times Mirror Corp., supra,* 215 Cal.App.3d at 1043 ("[T]he courts [are] unanimous in holding that the state constitutional privacy provision provides some protection against nongovernmental intrusion."); *Luck, supra,* 218 Cal.App.3d at 19 ("*Schmidt* provides us too slim a basis

to ignore the accepted principle of existing law that the right to privacy limits private as well as state action.").

Objectively, the decision's distinction between governmental and nongovernmental intrusions on privacy is dictum; here, as in *Schmidt*, state action is present. *See, e.g.*, *Huntley v. Public Utilities Com.* (1968) 69 Cal.2d 67, 76, holding that a PUC tariff requiring speaker identification as a condition of communicating over the telephone (albeit by recorded message) violates the First Amendment. In *Huntley* the Court Said:

> [T]he telephone company is a public utility subject to the control of the commission, a state agency. The proposed tariff is efficacious *only* because of state action. Constitutional scrutiny of state action is not predicated upon finding a direct restriction, there only need be a causative relation between the state action and the obnoxious result.

Id. (emphasis in original; citations omitted). But the presence of state action here is merely an additional reason why I would not reach out to make such a distinction.

Moreover, I do not find it necessary to posit a distinction between "political" speech and other speech for purposes of constitutional analysis. While it is true that the recorded message in *Huntley* was political in nature, I do not read the Court's opinion as suggesting that any greater protection applies to political speech than other speech. The First Amendment protects the communication of information and ideas, whatever their content, and First Amendment problems arise when a speaker is compelled to identify himself, thus discouraging such communication. *Huntley, supra*, 69 Cal.2d at 72, 74. With extremely limited exceptions, such a content-

based distinction is inimical to the fundamental application of the First Amendment.

The PUC tariff in *Huntley* was found to be impermissibly overbroad because its restriction on speech was not limited to evils such as obscenity, fraud, false advertising and libel. *Id.*, at 74. *Huntley* thus suggests that the tariff's effect of inhibiting all other types of recorded telephone messages violates the First Amendment. *Id.* As noted in *Huntley*, 69 Cal.2d at 74, quoting *Talley v. California* (1960) 362 U.S. 60, 64, "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to *distribute information* and thereby freedom of expression." (Emphasis added.) *See also White v. Davis, supra*, 13 Cal.3d at 765-73 (finding a First Amendment violation in government surveillance which would chill "the free expression of ideas" on a college campus).

In my view, *Huntley* is on all fours with the instant case: a PUC-approved tariff offering Caller ID service without the blocking requirements and other safeguards we announce today would be just as violative of the First Amendment (and the expanded protections of the state constitutional right of privacy[1]) as the PUC-approved tariff overturned in Huntley. That is so because a calling party number disclosure requirement would deter individuals desiring to maintain the privacy of their telephone numbers from freely communicating information or ideas over the telephone.

It is worth noting that in *Canon v. Justice Court* (1964) 61 Cal.2d 446, the Supreme Court upheld a statute (Elec. Code, § 12047) prohibiting anonymous campaign publications. The Court found that the statute's purposes in requiring speaker identification – facilitating the electorate's evaluation

of the material by identifying its source, deterring irresponsible political attacks and enhancing a candidate's opportunity to rebut charges, thereby preserving the integrity of elections – outweighed the statute's inhibitory effect on free speech. *Id.*, at 452-54. Hence, the Court has upheld a speaker identification requirement which it found to limit political speech.

Indeed, even if the decision's political speech distinction were appropriate for purposes of First Amendment analysis, callers whose telephone numbers would be subject to compelled disclosure under unrestricted Caller ID would unquestionably be engaging in such speech on some occasions. Again, I do not find it necessary or appropriate to reach this point in the Commission's analysis of the right of privacy under Article I, § 1, of the California Constitution.

Finally, I do not find it necessary to raise the question of whether telephone callers have a "reasonable expectation of privacy" in the numbers from which they are calling. While that test may be appropriate for privacy analysis in an unlawful search and seizure context, *see People v. Crowson* (1983) 33 Cal.3d 623, 629, it is apparently not the relevant test where, as in *White v. Davis, Huntley* and the instant case, "First Amendment as well as right to privacy principles" are implicated, 33 Cal.3d at 629, fn. 5. In such circumstances, the test is more absolute and less subjective: it precludes any incursion into fundamental rights which is not narrowly tailored to serve a compelling state interest. *White v. Davis, supra,* 13 Cal.3d at 772, 775; *Huntley, supra,* 69 Cal.2d at 78-79. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [F]undamental rights may not be submitted to

vote; they depend on the outcome of no elections." *West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624, 638. "Whatever role the subjective expectation of privacy may play in determining the extent of a constitutional right, ' . . . the state cannot curtail a person's right to privacy by announcing and carrying out a system of surveillance which diminishes that person's expectations.' " *People v. Chapman* (1984) 36 Cal.3d 98, 113, *quoting DeLancie v. Superior Court* (1982) 31 Cal.3d 865, 875, fn. 11.

[23] I also respectfully dissent from the decision's authorization of the CLASS feature known as Anonymous Call Rejection or "Block the Blocker." First, I consider the approval of this feature inappropriate because none of the applicants requested authority to offer it. Thus the issue is not properly before us.

Second, on the scant record available to us, I do not believe that the feature serves the public interest. Anonymous Call Rejection would allow a subscriber to tell the telephone company that he or she does not wish to receive calls from any caller who blocks the delivery of the calling party's number. Where a blocked call is placed to the Anonymous Call Rejection subscriber, the subscriber's telephone does not ring. Instead, the call is mechanically intercepted at the central office, where a recording informs the caller that the party he is calling does not wish to receive calls from anyone blocking his number, but if the caller wishes to unblock by pressing the appropriate code, the call will go through to the called party, who may or may not answer.

Anonymous Call Rejection could greatly inconvenience subscribers who happen to have "firm" per-line blocking and cannot enable calling number disclosure, those who have

unlisted or nonpublished numbers (which according to some studies exceed fifty per cent of subscribers in many metropolitan areas) and those who simply would prefer not to disclose their numbers as a condition of having the telephone of the party they are calling ring. Such subscribers should not be put to the inconvenience of having to seek out a public or other telephone in order to attempt to preserve their privacy and complete the call. In my opinion, there are many circumstances in which such inconvenience might rise to the level of intrusion on the rights of free speech and privacy. Indeed, as in *Huntley* and *Talley*, and to some extent *White v. Davis*, the compulsion to disclose private information as a condition of speaking may cause the caller to elect not to speak at all. Imagine, for example, the situation in which a caller with an unlisted telephone number legitimately desires to communicate important information and ideas over the telephone to an Anonymous Call Rejection subscriber. The caller is left with the Hobson's Choice of surrendering his heightened privacy in the unlisted number he has purchased or electing not to complete the call, thereby surrendering his right of free expression. Imagine, also, the situation in which a person attempts to make an emergency call to an Anonymous Call Rejection subscriber from a line-blocked telephone. The caller may be left with the alternative of running to the corner grocery store to find a telephone to deal with the emergency.

Without further consideration of all its ramifications, I do not believe that the telephone company should offer a service which intercepts phone calls before they reach the called customer's premises unless the caller relinquishes his right of privacy, even on instructions of the call recipient. I have misgivings about authorizing a service which conditions the caller's desire to have his call go through to the called party's

premises upon the surrender of fundamental rights. Anonymous Call Rejection seeks to facilitate call screening on the basis that there is something inherently wrong with a caller's exercising his right of privacy and blocking delivery of his number. We should exercise great care – more than was appropriate in this case where the service was not requested – before giving credence to this inference.

Finally, by authorizing CLASS services such as Caller ID, Call Block and Priority Ringing, as we do today, we grant call recipients significant added ability to protect their privacy from intrusion by unwanted telephone calls. Subscribers to Caller ID need never answer blocked calls; the subscriber may merely observe on the Caller ID display unit that the calling party's number is blocked and choose not to pick up the receiver.

I believe that the record before us is inadequate to facilitate the full airing of the implications of Anonymous Call Rejection. I therefore dissent from our authorizing the Anonymous Call Rejection feature at this time.

Despite these concerns, I believe that the Commission's decision authorizing CLASS services with safeguards is consistent with the public interest and the privacy requirements established by the California Constitution. I therefore concur in the result reached in the majority opinion.

/s/ NORMAN D. SHUMWAY
June 17, 1992

San Francisco, California

FOOTNOTES

Interim Opinion

[1] We note that each of the applicants has utilized distinctive product names, some of which are asserted to be protectable service marks, in packaging their CLASS services. In our view, it would be extremely helpful to consumers if the applicants could agree among themselves on a single and fairly descriptive name for corresponding offerings to be provided across the state. We encourage the applicants to do so.

[2] The proposed decision, issued on January 21, 1992, found that Caller ID, even with a choice of all available blocking options, would constitute an unwarranted intrusion on the state and federal privacy rights of California citizens and would not be in the public interest because the detriments associated with the feature would outweigh its benefits. Pursuant to Rule 77 et seq., the following parties filed comments and replies to the proposed decision: applicants, AT&T, Consumer Action, California Alliance Against Domestic Violence, California Department of Consumer Affairs, California Bankers Clearing House Association, the Division of Ratepayer Advocates, Roseville Telephone Company, the smaller independent LECs, MCI, TURN, and UCAN. These comments have been considered in our decisionmaking process.

[3] As noted by the ALJ, Caller ID is actually a misnomer. The feature is a calling "number" identification service and does not disclose the identity of the individual making the call.

[4] The per-call blocking code for rotary telephones would be 1167.

[5] As will be discussed more fully below, some of the parties contend that other, more restrictive options for protecting calling party privacy, such a per-line blocking or per-line blocking with per-call enabling, should be required.

[6] Currently, the Digital Multi-Plex System 100 switch is unable to provide per-call blocking to coin phones.

[7] The person receiving a telephone call has an interest in not being imposed upon by those with whom he or she chooses not to associate. *See, e.g., Rowan v. Post Office Department* (1970) 397 U.S. 728, 736-37; and *Martin v. Struthers* (1943) 319 U.S. 141, 148. This interest is not insubstantial. In a very real sense, the called party's zone of privacy (and ability to control the peaceful enjoyment of his or her surroundings) is

intruded upon whenever a calling party demands his or her attention in response to the ring of the telephone.

[8] *See, e.g., Rowan v. Post Office Department, supra,* 397 U.S. at 736-37; and *Martin v. Struthers, supra,* 319 U.S. at 148.

[9] The legislative findings underlying PU Code § 2893 – the California statute which address the issues surrounding the provision of calling number identification services such as Caller ID – support this view. The Preamble to that section, Stats. 1989, c. 483, § 1, provides:

> The Legislature finds and declares all of the following:
>
> (a) Telephone subscribers have a right to privacy, and the protection of this right to privacy is of paramount state concern.
>
> (b) To exercise their right to privacy, telephone subscribers must be able to limit the dissemination of their telephone number to persons of their choosing.

[10] It is worthy of note, however, that the *Chapman* court was expressing itself in the context of a criminal prosecution. The Court concluded that a defendant had a reasonable expectation of privacy in the unlisted information which the telephone company disclosed to the police, and that this right was protected under Art. I, § 13 of the California Constitution which shields residents from a search or seizure without prior judicial approval. (36 Cal.3d 98, 105-108.) Caller ID services in the hands of the general public pose a lesser threat to the constitutional restraints on unsanctioned searches and seizures by the police.

[11] The Davis court cited *Carter v. Com. on Qualifications* (1939) 14 Cal.2d 179 and other authorities for the proposition that it is legitimate to resort " . . . to election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." 13 Cal.3d 757, 775, fn. 11.

[12] The *Blair* court cited with approval at 1975 decision of the District Court of Appeal which had held that an individual's right to privacy was violated when telephone company records of his outgoing calls were disclosed to police officials who had not obtained a warrant. *People v. McKunes* (date) 1975 51 Cal.App.3d. 487, 490-91. 25 Cal.3d at 653-54.

[13] The Court again took the opportunity to indicate that the protected right of privacy in California was more extensive than has been recognized as mandated by the United States Constitution. *United States v. Miller* (1976) 425 U.S. 435, and *Smith v. Maryland* (1979) 442 U.S. 735, were cited for the proposition that there is no expectation of privacy in bank records or the record of outgoing telephone calls. The rejected rationale of these federal decisions was that the user voluntarily conveys this information to a third party such as the bank or telephone company.

[14] 36 Cal.3d at 108, 110.

[15] Commissioner Shumway's concurring opinion apparently rejects our readings of *Talley* and *Huntley* as charting the dimension of a right to remain anonymous. Yet no authority is cited for a more broadly cast (reading) than the one we have identified. Indeed, an attempt to extend *Huntley* beyond the context of political speech can only be undertaken if one ignores the explicit limitation placed by the Court on the result it announced. We are content to rely upon the views of the California Supreme Court as expressed at 69 Cal. 2d at 72-73.

[16] Id. at 64-65.

[17] " . . . We conclude that [plaintiff] has not waived her right to sexual privacy.

"But even though plaintiff retains certain unwaived privacy rights, these rights are not necessarily absolute. On occasion her privacy interests may have to give way to her opponent's right to a fair trial. Thus courts must balance the right of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery."

[18] Compare People v. Chapman, supra, 36 Cal.3d 98, *People v. Blair* (1979) 25 Cal.3d 640, *Burrows v. Superior Court* (1974) 13 Cal.3d 238, and *People v. McCunes* (1975) 51 Cal.App.3d 487, with *Smith v. Maryland* (1979) 442 U.S. 735, and *United States v. Miller* (1976) 425 U.S. 435.

[19] As Benjamin Cardozo noted, "The half truths of one generation tend in time to perpetuate themselves in law as the whole truths of another, when constant repetition brings it about that qualifications, once taken for granted, are disregarded or forgotten." *Allegheny College v. National Chautauqua County Bank of Jamestown* (1927) 246 N.Y. 369, 159 N.E. 173. Judge Cardozo was speaking of the common law contract doctrine of consideration. Yet his sentiment may be even more apt to

concepts as vital as privacy and the terms of an explicit social contract embodied in a written constitution.

Commissioner Shumway's concurring opinion expresses the view that "a distinction between violations of privacy by the government and violations by private parties . . . is misplaced." From our perspective, we have not created this distinction. The proposition that our Constitution seeks to limit the power of government is rooted in the most fundamental notions of ordered liberty. To suggest otherwise is to omit the literal language of the First Amendment. Private wrongs are the object of civil litigation. To remove from context and extend on the wings of speculation the language of constitutional precedent is, to our minds, an assumption on the part of the Commission of " . . . the judicial power to determine the constitutional rights of California citizens." Such a right was emphatically denied by our Supreme Court in *People v. Chapman* (1984) 36 Cal.3d 98, 111, fn. 9. We have examined *Chapman* as well as the content of Section 1760 of the Public Utilities Code enacted some 33 years prior to the Court's remark. We have concluded that our deliberations will, from time to time, engage issues of constitutional interpretation. In such circumstances we are to seek guidance from the pronouncements of the Court with the knowledge that should we err, the Court will exert appropriate correction. See also, *Pacific Tel. & Tel. Co. v. Public Util. Com.* 62 Cal.2d 634, 646 (1965).

[20] In some jurisdictions, the use of the *67 code for per-line blocking with per-call enabling has created confusion because it is the same code as that used for per-call blocking. We understand that the technological capability of using a per-call enabling code other than *67 is or soon will be available. When we refer to per-line blocking with per-call enabling, we mean per-call enabling which utilizes an enabling code other than *67.

[21] We recognize that at present, GTE does not have the capability of providing per-line blocking without per-call enabling. We are troubled that GTE did not plan its network development to ensure the existence of a switching capability to provide such blocking. If GTE is to provide these services, it should develop a per-line blocking capability at the earliest opportunity. However, if it meets all other requirements for offering CLASS services, it may offer the services temporarily substituting per-line blocking with per-call enabling for those customers who choose per-line blocking. GTE shall include progress reports on this point in its periodic tracking reports.

[22] In other contexts, the Commission, in collaboration with the Legislature, has taken steps to assure that intrusion into the privacy of telephone communications can result only where all parties to the call have consented. E.g., PU Code § 7906; General Order No. 107-B; *Air Transport Ass'n v. Pub. Util. Comm'n* (9th Cir. 1987) 833 F.2d 200, cert. denied (1988) 487 U.S. 1236; *Re Monitoring of Telephone Conversations* (1983) 11 Cal.P.U.C.2d 692, *reh'g denied* (1983) 13 Cal.P.U.C.2d 47; D.88232 (1977) 83 Cal.P.U.C. 149; D.73146 (1967) 67 Cal.P.U.C. 528; D.69447, (1965) 64 Cal.P.U.C. 526.

[23] Unlisted numbers are those telephone numbers available only through directory assistance but do not appear in the white section of the telephone directory or street address directory. See, for example, Pacific Bell Schedule Cal.P.U.C. No. A5.7.1.B.1.

[24] Nonpublished telephone numbers are not listed in any telephone directory, street address directory, or in the directory assistance records available to the general public. See, for example, Pacific Bell Schedule Cal.P.U.C. No. A2.1.34.A.

[25] See discussion in "Deployment Limitations" above.

[26] By this reference, we mean both coin phones and other blocking-incompatible services or equipment owned by the applicants and those provided to customers pursuant to tariff. To the extent necessary, the applicants shall amend their tariffs to assure that this protection is provided.

[27] It is not our intention that there be a time limitation on a subscriber's one free *change* of blocking option, once the initial selection by choice or default has been made.

Norman D. Shumway, Commissioner,
Concurring

[1] *See, e.g., City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130, fn. 3.

EXCERPT FROM REPLY OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION, EXHIBIT E (FILED AT FCC ON AUGUST 17, 1994)

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	CC Docket
	)	No. 91-281
Rules and Policies Regarding	)	
Calling Number Identification	)	
Service – Caller ID	)	
	)	

REPLY DECLARATION OF ERNEST S. TING

I ERNEST S. TING, declare:

I am employed by the California Public Utilities Commission ("CPUC") as the Manager of Telecommunications for the Commission's Strategic Planning Division ("SPD"). My business address is 505 Van Ness Avenue, San Francisco, California 94102.

In addition to my duties for the CPUC, I have in recent years served as a member of the Staff of the Section 410(b) Federal-State Joint Conference on Open Network Architecture. In connection with my responsibilities for both the CPUC and the Joint Conference, I have had occasion to review data indicating the volume of intrastate and interstate telephone traffic for carriers operating in California. Such information is routinely provided by such carriers both to the FCC and to the CPUC.

In an earlier declaration which I submitted in this proceeding in connection with the PETITION OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA FOR RECONSIDERATION AND CLARIFICATION AND COMMENTS ON FURTHER NOTICE OF PROPOSED RULEMAKING ("California's PFR") filed herein on or about May 18, 1994, I indicated that on a national basis approximately eighty-five to ninety per cent of the minutes of usage of the telephone network involves intrastate telephone communication and approximately ten to fifteen per cent of the minutes of usage involves interstate telephone communication. I concluded based on these data that roughly eighty-five to ninety per cent of the usage of the network involving Caller ID would be intrastate usage and roughly ten to fifteen per cent would be interstate usage.

In attempting to update and particularize for California carriers the information and conclusions contained in my earlier declaration, I have examined more recent data than I relied on in my earlier declaration. These data identify not just minutes of usage but the number of calls originated by the customers of California carriers. In examining these data, I have concluded that because the availability of Caller ID service assumes that CPN transmission or blocking occurs with every call, and occurs just once for each call, the number of calls, rather than the number of minutes of usage, is a better measure of the relative potential Caller ID traffic properly allocated to the intrastate jurisdiction and to the interstate jurisdiction. Moreover, since the caller's determination to block or disclose CPN is made at the originating end of a telephone call, data which include calls originating in California, rather than minutes of usage for interLATA calls counted

at both the originating and terminating ends, present a clearer picture of the relative proportion of intrastate and interstate traffic potentially applicable to California-regulated intrastate and FCC-regulated interstate Caller ID services.

I have reviewed date for three California carriers – Pacific Bell, GTE California Incorporated and Roseville Telephone Company. I obtained these data from the most recent (1993) annual reports submitted to the FCC and the CPUC by these companies. True copies of these data are attached hereto as Appendix A.

Using these data, I calculated the relative proportion of interstate and intrastate calls for each carrier applicable to potential Caller ID service originating in California by adding the local calls completed, the intraLATA toll calls completed and the interLATA intrastate toll calls completed (originating in California) for that carrier. I took this total as the total number of intrastate calls potentially applicable to Caller ID service for the carrier. I then compared this total with the total number of interLATA interstate toll calls originating in California for the carrier. Using that methodology, I computed the relative proportion of intrastate and interstate traffic for these carriers as follows:

Carrier	**Relative % Telephone Calls (1000s)**	
	Intrastate	**Interstate**
Pacific Bell	54,397,752 (92.38%)	4,489,740 (7.62%)
GTE California Inc.	12,398,803 (93.64%)	842,727 (6.36%)
Roseville Telephone Co.	314,961.34 (94.46%)	18,487.54 (5.54%)

Based on these calculations, I believe it is reasonable to conclude that Pacific Bell traffic potentially applicable to Caller ID services is more than 92% intrastate and less than than 8% interstate, GTE California traffic potentially applicable to Caller ID service is almost 94% intrastate and slightly more than 6% interstate, and Roseville traffic potentially applicable to Caller ID service is more than 94% intrastate and less than 6% interstate.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California, this 10th day of August, 1994.

/s/ Ernest S. Ting
ERNEST S. TING
Declarant

EXCERPT FROM EX PARTE LETTER FROM PACIFIC BELL TO FCC FILED AT FCC MARCH 27, 1995

Gina Harrison
Director
Federal Regulatory Relations

PACIFIC * TELESIS.
Group-Washington

1275 Pennsylvania Avenue N.W.
Suite 400
Washington D C 20004
(202) 383-6423

March 27, 1995

EX PARTE

William F. Caton
Acting Secretary
Federal Communications
Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Received
Apr. 05, 1995
LEGAL
DIVISION

Dear Mr. Caton:

Re: *CC Docket No. 91-281, Caller ID*

On Friday, March 24, 1995, Jo Ann Mataraci and Robert J. Mazique of Pacific Bell, and I met with James L. Casserly, Senior Legal Advisor to Commissioner Susan Ness; Courtney Bailey, an intern in the Office Commissioner Rachelle B. Chong; and Michael Katz, Chief Economist, Office of Plans and Police, to discuss issues outlined in Attachment 1 which was used during the presentation. We also gave Ms. Bailey copies of the documents contained in Attachment 2. Please

associate these materials with the above-referenced proceeding.

We are submitting two copies of this notice in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

/s/ Gina Harrison

Attachment

cc: James L. Casserly
Courtney Bailey
Michael Katz

Impacts of the Caller ID Order on the California Economy

PACIFIC BELL
A Pacific Telesis Company

Order Options	Implementation/Results	1st Yr. Expense*	Benefits/New Business Opportunities**
1. Modify original order to adopt a national model which allows per call & per line with the blocking default as per call	• Pacific Bell would educate Californians on blocking • Pacific would rollout Caller ID	$47M	• Customers/Businesses have requested: - The ability to identify who the customer is; (e.g., voter poling, geographic information for radio stations, PAY-PER-VIEW-TV, automobile clubs, fraud protection, law enforcement) - Wireless providers want CLASS - Productivity improvement - any company that has incoming calls for ordering (e.g., travel agent, bank, pizza delivery, catalogue shopping) - Retail sales (e.g., CPE and software)
2. Clarify original order to include intra and interstate calls (per call blocking only)	• Pacific Bell would educate Californians on blocking • Pacific would rollout Caller ID	$20M	
3. Defer to existing state regulations on blocking: order passage of CPN	• Forces Pacific to implement CPUC blocking and education requirements even if CPN is only passed interstate • California blocking rules make Caller ID unprofitable	$51M	• High % of line blocking would impact the success of any CPN based product or service • Likely that Caller ID will not be offered in California which means none of the above opportunities will come to fruition
4. Reconfirm original per call blocking order, clarify interstate only	• This forces California into a dual blocking situation for intra and interstate calls. • Extensive delay to implement dual blocking - 7 years • California blocking rules make Caller ID unprofitable	$186.4M	• It would be many years before businesses would be benefit from the passing of CPN, if ever • High % of line blocking would impact the success of any CPN based product or service • Likely that Caller ID will not be offered in California which means none of the above opportunities will come to fruition

* preliminary cost studies

** Since there is no Caller ID product in California it isn't possible for Pacific Bell to quantify the benefits to the economy. The information included here is based on specific requests from businesses across the state

CPN and Compensation

All Carriers recover SS7 network costs today.

- The Commission opined, in 1989, and reiterated in 1991, that the SS7 signaling network was a network upgrade, the costs of which would be recovered through network efficiencies and new interstate and intrastate services rather than through a separate rate structure. Accordingly, LEC tariffs offer either MF or SS7 signaling with FG D access at the same local switching and local transport rates. The CPN parameter itself is offered as a nonchargable option. (CC Docket 86-10, Report and Order, released April 21, 1989, para. 70 and MO&O, released September 4, 1991, para. 37).

  - Pacific believes there will no significant impact to our SS7 network that would cause us to reengineer as a result of passing CPN.

- Both LECs and IXCs recover the costs of their SS7 networks today through a combination of network efficiencies and tariffed rates for services such as FG D access, 800 and 900 services, ISDN, private virtual networks and other SS7-based services.

Switch work required to change the CPN status to pass is insignificant.

Not pass CPN	Pass CPN
AT&T no work required, switch default is not to pass CPN	**AT & T and Northern Telecom** In both switch types, each carrier common block must be changed from no to yes to pass CPN
Northern Telecom default is to pass CPN, requires that the option to pass CPN be set to no on a CIC basis in every switch	

Assumption: Switch activity required by a LEC to pass CPN or not pass is comparable to activity required for an IXC since SS7 protocol is standardized and all switch vendors comply with current requirements.

Costs to Pacific to enable blocking options

Additional work required to provide per call blocking only

- In all switch types, each carrier common block translations must be changed from no to yes to pass CPN
- Assign per call blocking code to individual private dialing plans
- 5ESS & DMS 100 - remove office privacy restrictions

Estimated cost: $1.8M

*67 is already in the switches, it was loaded & translated when other CLASS software was installed several years ago.

Additional switch work required to provide per call and per line blocking with *82 unblocking

- In all switch types, each carrier common block translations must be changed from no to yes to pass CPN
- Assign per call blocking code to individual private dialing plans
- 5ESS & DMS 100 - remove office privacy restrictions
- Perform translations work to turn on *82 capability in all switches

Estimated cost: $2.8M

*82 is technically available and installed in our 5ESS & DMS 100 switches, need to purchase for SSC at an estimated cost of $50,000.

This reflects switch work only. It does not include activities or costs for service order development, customer selection information or customer education. Those costs are included in 1st Yr. Expense on page 1.

Economic Impacts as a result of California passing CPN

- Since there is no Caller ID product in California it isn't possible for Pacific Bell to quantify the benefits to the economy. However, here is some data which identifies CPN's potential impact on the national and the state economy.

- California has the largest number of originating interstate calls at 5.4M. This is 2.4M more than the next largest state, New York.

National

- California originates 17% of the nations interLATA calls.
- 23% of the nations toll call volume (LATA, state and interstate) originates in California.
- 57% of California's originating interLATA toll calls are interstate.
- California's ethnic mix and close geographic proximity to Mexico, Central America and the Pacific Rim would suggest significant opportunity in the international markets;
  - 28% of California's population is Hispanic, nationally this number is 10%.
  - 11% of California's population is Asian, nationally this number is 3%.

California

- 70% of all toll calls (LATA and interLATA) originate in California, terminate in California. Nationally, only about 50% originate and terminate in the same state.
- Over one third (36%) of the national intraLATA call volume is in California.
- California has 32% of the nation's intrastate toll calling (intraLATA and interLATA).

ATTACHMENT 2

Mary L. Vanderpan
Regulatory Vice President

PACIFIC * BELL
A Pacific Telesis Company

140 New Montgomery, Room 1814
San Francisco, California 94105
(415)542-1268

June 3, 1994

Mr. Ken Henderson
Commission Advisory and Compliance Division
505 Van Ness Avenue, Third Floor
San Francisco, CA 94102

Dear Mr. Henderson:

Pacific is requesting an interpretation of the California Public Utility Commission's current orders to determine whether the blocking requirements for Caller Identification (Caller ID) apply to the passing of interLATA Calling Party Number (CPN).

Caller ID is a product that has been examined in many forums. The California Public Utilities Commission issued D.92-11-062 that set forth the blocking requirements and customer education necessary to deploy the caller ID service. The blocking requirements included both per call blocking and per line blocking. As you are aware, Pacific Bell has not deployed the Caller ID service.

Recently, the FCC issued a ruling in the Notice of Proposed rule making, CC Docket No. 91-281, which established the requirements for interstate Caller ID. It ruled that all SS7 capable companies must begin passing Calling Party Number (CPN), with per call blocking only, to InterExchange carriers starting April 12, 1995. In this rule making, the FCC made it clear that line blocking is not allowed on interstate calls.

When the CPUC order and FCC rule making are compared, it appears they may be in conflict regarding blocking requirements for Caller ID or the passing of CPN. However, Pacific would like to determine whether these orders conflict if Pacific does not deploy intrastate Caller ID, but begins to pass CPN as ordered by the FCC.

It appears that the current CPUC decisions may apply to the passing of CPN. If these CPUC decisions only apply to deployment of Caller ID services, and Pacific does not deploy Caller ID, then it would appear there would be no conflict. In that event, the blocking for that call would need to comply with FCC, not CPUC, requirements. In that case, Pacific will begin passing CPN to the InterExchange Carriers on April 12, 1995. However, if the current CPUC rulings apply to any passing of CPN, then even if Pacific does not deploy Caller ID, the CPUC and FCC rulings will conflict on blocking requirements for CPN.

In summary, Pacific would appreciate an interpretation of the CPUC's current orders to determine if there would be any violation of CPUC requirements if, on April 12, 1995, Pacific begins to pass CPN, with Per Call Blocking, to InterExchange Carriers. It is important to clarify this as quickly as possible in order to ensure any conflicts are addressed in time to meet the April 12, 1995, FCC date.

If you would like to discuss this, or have any questions about what we are requesting, please give me a call.

Sincerely,

/s/ Mary L. Vanderpan

cc: M. Fogelman
J. Leutza

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION (Seal)
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

September 14, 1994

Ms. Mary Vanderpan
Vice President
Pacific Bell
140 New Montgomery Street, Rm. 1814
SAN FRANCISCO CA 94105

Re: Caller ID and InterLATA CPN

Dear Ms. Vanderpan:

I am writing in response to your letter of June 3, 1994, concerning Caller ID service and the passage of CPN intrastate. I apologize for the delay in responding, but I was not aware of any particular urgency to the request.

You have asked for our interpretation of what a LEC's requirements would be concerning passage of CPN if the LEC is not offering intrastate Caller ID service but is required to provide CPN to IECs for interstate calls as ordered by the FCC.

The rationale of the commission's Caller ID decision clearly appears to require that a LEC assure the protection of the privacy of CPN for its customers' intrastate calls either (1) by not passing the CPN for intrastate calls to other California carriers that offer Caller ID service or (2) by providing its customers with the blocking options required by the Commission's decision for their intrastate calls. This would be true, whether or not the LEC offered Caller ID service. As you know, CPN blocking is initiated at the originating rather than the terminating end of the telephone call.

The Commission's decision, which concludes that Caller ID is in the public interest, also appears to contemplate a transition to a world in which Caller ID service is offered by all California carriers.

We believe that the rationale of the Commission's decision also requires customer notice where customer blocking options are provided.

We believe that it is feasible for California LECs employing SS7 switches to determine the jurisdictional nature of most calls by comparing the area codes of the calling and called numbers. We also believe that it has been shown in the FCC Caller ID proceeding that it is feasible to have different Caller ID blocking regimes for intrastate and interstate calls. Nevertheless, in the FCC proceeding, the Commission has not advocated the deployment of dual blocking regimes but has instead requested that the FCC, in clarifying its interstate Caller ID regime on reconsideration, simply defer to the intrastate blocking regime of the originating state, subject to minimum federal privacy standards.

I hope this answers your inquiry. If you have further questions on this matter, please direct them to Mark Fogelman of our Legal Division, (415) 703-1992.

Sincerely,

/s/ Kenneth K. Henderson
KENNETH K. HENDERSON
Director
Commission Advisory & Compliance Division

cc: Jack M. Leutza
M.J. Purcell
Mark Fogelman

EX PARTE LETTER FROM CPUC TO FCC AND APPENDIX A FILED AT FCC APRIL 26, 1995

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION (Seal)
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 25, 1995 **VIA FEDERAL EXPRESS**

EX PARTE

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Rules and Policies Regarding Calling Number Identification Service – Caller ID, CC Docket No. 91-281

Dear Mr. Caton:

In accordance with Section 1.1206(a)(1) of the Commission's Rules, the People of the State of California and the Public Utilities Commission of the state of California ("California" or "CPUC") hereby submit for filing two copies of this letter, along with the attached copy of their letter to Chairman Hundt, Commissioners and staff seeking thirty days to respond to the *ex parte* filings of Pacific Telesis and Pacific Bell dated February 14, 16, 17, 21, 24, 1995, March 7, 8, 24 and 27, 1995, and April 24, 1995.

A copy of this letter and the attached letter (with attachments) is being sent to each of the Commissioners and to all parties who received *ex parte* presentations from Pacific Telesis and

Pacific Bell as reflected in their above-referenced *ex parte* filings.

Please make this letter and the attachments hereto part of the record.

Sincerely,

/s/ Mark Fogelman
Mark Fogelman
Principal Counsel

Attachments

cc:

Chmn. Hundt	S. Tetrault	J. Keegan	M. Katz
Comr. Barrett	J. Casserly	C. Bailey	M. Specht
Comr. Quello	J. Coltharp	R. Welch	M. DeLuca
Comr. Chong	K. Levitz	M. Bertman	M. Gordon
Comr. Ness	A. Gomez	W. Kennard	K. Brinkman
K. Wallman	L. Dubroff	L. Belvin	

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION (Seal)
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 25, 1995 **VIA FEDERAL EXPRESS**

EX PARTE

Hon. Reed E. Hundt, Chairman,
Commissioners and Staff
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Rules and Policies Regarding Calling Number Identification Service – Caller ID; CC Docket No. 91-281

Dear Chairman Hundt, Commissioners and Staff:

The People of the State of California and the Public Utilities Commission of the State of California (hereinafter collectively "California" or "CPUC") hereby request that they (and all parties herein) be given thirty days within which to respond to the *ex parte* filings of Pacific Telesis and Pacific Bell (hereinafter collectively "Pacific") dated February 14, 16, 17, 21, 24, 1995, March 7, 8, 24 and 27, 1995, and April 24, 1995, in the above matter. California only learned of and obtained copies of these voluminous filings which purport to provide new information in the past three weeks, and only yesterday received a copy of Pacific's April 24th filing, which indicates that Pacific has received and been given an opportunity to comment on information concerning the Commission's intended decision on reconsideration. If these proceedings are to be fundamentally fair, all parties must be

given the same information concerning the Commission's intended decision and the same opportunity to comment.

If California and other parties are not given a fair opportunity to respond to Pacific's filings, they will have been denied due process of law. Like many states and state commissions and unlike all of the major carriers, including Pacific, California does not have employees stationed in Washington, D.C., to review and evaluate filings and likely presentations made by carriers to the Commissioners, their Staffs and the Common Carrier Bureau. California is simply not in a position constantly to monitor the *ex parte* communications of the numerous carriers seeking to influence the Commission's determination in this case. Moreover, Pacific did not provide copies of its filings to California until April 5, 1995, when California demanded that it do so. The use of the Commission's procedures to favor certain parties over other parties is fundamentally unfair.

California believes that much of the information presented to the Commission by Pacific in its *ex parte* filings is inaccurate, incomplete or misleading. The Commission should not render a decision on reconsideration without allowing all parties an opportunity to correct the record.

Although California urges the Commission to grant all parties an additional thirty days within which to file final comments in this proceeding because it cannot respond fully without such additional time, it wishes to address briefly some of the points addressed in Pacific's filings.

Regarding California's default of per-line blocking with per-call enabling for subscribers with non-listed or non-published numbers who fail to choose a blocking option, California submits that such a default assignment of blocking option

should in no event be addressed, altered or pre-empted by the Commission's order on reconsideration. The non-published subscriber default, which California has found mandated by the privacy guarantee of Article I, § 1, of the California Constitution, is extremely important to the California's efforts to ensure that disclosure of CPN by California citizens is the result of informed consent.

California has the eleven metropolitan areas having the highest proportion of unlisted numbers in the country. *See* Appendix A hereto. These areas range from 68.8% of telephone users (Sacramento) to 60.4% (Ventura County). *Id.* Based on these figures, CPUC Staff estimates that there are approximately 7 million households in California with unlisted numbers. If a customer notification and education program were incredibly effective and reached 70% to 75% of these households, there would still be between one and two million households that pay charges each and every month for a private telephone number that would not receive notice. If the default for these unlisted subscribers who do not receive notice were changed to per-call blocking, the lack of actual notice would result in the disclosure of CPN on every call they make without their informed consent. These customers would likely include victims of spousal and child abuse, whose lives and safety could be at risk, elderly people and people with disabilities whose families had chosen the protection of an unlisted number for them, people who obtained unlisted numbers to avoid telephone harrassment, people who want to keep information about themselves from those who compile directories or databases, and people who just want to choose those people who know their telephone numbers. If the default were to remain per-line blocking with per-call enabling, these people would be able to have their numbers

disclosed to the called party whenever they chose by depressing the *82 enabling code. In a proceeding in which Pacific was involved, a CPUC Administrative Law Judge found that *82 enabling is currently feasible. Pacific did not appeal from that determination, and in fact has stated to the Commission in its recent *ex parte* filings that *82 enabling could be made available on its system at minimal cost.

The CPUC's determination of the per-line blocking with per-call enabling default for people with non-published and non-listed numbers is fundamental to the principle that individual citizens should be able to choose when their numbers are disclosed. The CPUC found that this principle is required by the privacy guarantee contained in Article I, § 1, of the California Constitution, and no party to the Commission's proceeding challenged that determination. *See* Pub. Util. Code § 1709. Moreover, the Commission's presumption that such parties would choose per-line blocking with per-call enabling over per-call blocking – if given the choice – is a rational presumption because those parties choose each month to have heightened privacy by paying monthly charges to have an unlisted number. Conversely, the presumption that such parties would choose per-call blocking is an irrational presumption because more likely than not, it is untrue. Such a presumption would ignore the conscious choice of such customers to keep their numbers private made every month when they pay their local exchange carrier for non-listed or non-published status.

The per-line blocking with per-call enabling default attempts to assure that any errors are on the side of ensuring that the non-published subscriber's number is not disclosed, absent affirmative and knowing consent. A per-call blocking default would err in favor of disclosure and would inevitably result in

some disclosures – perhaps thousands or millions of them – occurring where that is not the desire of the calling party. It is reasonable to assume that – more often than not – non-published subscribers will prefer to protect the privacy they pay for each month. *See Reply Declaration of Bridger M. Mitchell* filed by CPUC in FCC Caller ID proceedings. Moreover, the default chosen by the CPUC is more economical and efficient than a per-call blocking default. It represents a one-time sunk cost, while the processing costs of depressing the *67 blocking code with every call are volume- or usage-sensitive and thus recurring costs as well as costs that will inevitably require network and switch processor upgrades. *See Reply Declaration of Marvin A. Sirbu* filed by CPUC in FCC caller ID proceedings.

In addition, the per-line blocking with per-call enabling default for non-listed and non-published customers is the choice of California business interests, which were represented in the CPUC's Caller ID proceeding by the California Bankers Clearinghouse Association, a group comprised of California's largest and thus some of the country's largest banks. Members of that association included Bank of America, Wells Fargo Bank, Security Pacific Bank, Crocker Bank, First Interstate Bank, Bank of California and others. *See CBCHA Opening Brief,* Appendix B hereto.

Pacific has submitted data to the Commission (*see* Pacific's April 24th *ex parte*) suggesting that California originates 17% of the nation's interLATA calls, 23% of the nation's toll calls, 32% of the nation's intrastate toll calls and 36% of the nation's intraLATA calls. Even assuming these data to be correct, California has demonstrated in affidavits attached to its reply to oppositions to its PFR that approximately 94% of calls originating in California are intrastate and just 6% are

interstate, suggesting that the Commission should defer to California on this nuts-and-bolts aspect of how blocking options are selected by California telephone users. The Communications Act, the Commission and the Courts have all mandated that state telecommunications privacy regulation is not subject to federal pre-emption.

Finally, and not unimportantly, California's default protects the local exchange carriers such as Pacific Bell, GTEC and Contel of California, and other carriers – even those outside of California – that "pass" the calling party's number, from potential civil liability for the negligent or intentional unconsented-to disclosure of a calling party's telephone number. There is much California case authority to the effect that violation of the state constitutional right of privacy is an actionable tort. *See Porten v. University of San Francisco* (1976) 64 Cal.App.ed 825, 829-830; *Luck v. Southern Pacific Transp. Co.* (1990) 218 Cal.App.3d 1, 19; *Semore v. Pool* (1990) 217 Cal.App.3d 1087, 1094; *Wilkinson v. Times Mirror Corp.* ((1989) 215 Cal.App.3d 1034, 1042-43; *Cutter v. Brownridge* (1986) 183 Cal.App.3d 836, 842; *Park Redlands Covenant Control Committee v. Simon* (1986) 181 Cal.App.3d 87, 98; *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 851; *Kinsey v. Macur* (1980) 107 Cal.App.3d 265, 272. By ensuring knowing consent to the disclosure of calling party numbers, the default chosen by California protects carriers from liability. Notably, state law remedies for privacy violations, such as civil lawsuits, are clearly not preempted under the Communications Act.

California respectfully asks that the Commission consider these points on the merits of the issues pending on reconsideration, and that it forthwith issue an order, *sua sponte*,

allowing California and other parties thirty days to respond to Pacific's recent *ex parte* filings herein.

Sincerely,

/s/ Mark Fogelman
Mark Fogelman
Principal Counsel

MF:cip

Attachments

Survey Sampling, Inc.®

Unlisted Rates of the Top 100 MSAs for 1994

The proportion of U.S. telephone households not included in white page telephone directories, among the top 100 Metropolitan Statistical Areas (MSAs) ranged between 7.5% and 68.3% in 1994. As the national unlisted rate approaches nearly one-third (31.5% in 1994 versus 30.4% in 1993) of all U.S. telephone households, the need for representative random digit sampling techniques is more critical than ever. The table below presents the 1994 unlisted rates for the Top 100 MSAs.

MSA NAME	TOTAL MSA HHLDS	PERCENT HHLDS WITH PHONES	PERCENT ESTIMATED PHONE HHLDS UNLISTED	MSA RANK BASED ON PERCENT UNLISTED HHLDS
AKRON, OH PMSA	260,535	97.0	27.1	49
ALBANY-SCHENECTADY-TROY, NY	343,837	97.0	20.2	88
ALBUQUERQUE, NM	248,708	93.3	38.8	29
ALLENTOWN-BETHLEHEM-EASTON, PA	224,794	96.3	23.9	66
ANN ARBOR, MI PMSA	186,843	97.7	28.2	43
ATLANTA, GA	1,287,877	95.8	27.7	46
AUSTIN-SAN MARCOS, TX	365,735	93.6	22.7	76
BAKERSFIELD, CA	205,719	94.8	61.2	10
BALTIMORE, MD PMSA	925,989	96.6	31.0	34
BATON ROUGE, LA	201,250	95.0	19.8	91
BERGEN-PASSAIC, NJ PMSA	473,788	97.7	52.2	33
BIRMINGHAM, AL	337,400	95.8	28.9	67
BOSTON-LAWRENCE-LOWELL-BROCKTON, MA NECMA	1,415,764	98.2	20.0	89
BRIDGEPORT-STAMFORD-NORWALK-DANBURY, CT NECMA	305,807	97.7	17.9	96
BUFFALO-NIAGARA FALLS, NY	473,147	96.1	23.6	69
CHARLESTON-NORTH CHARLESTON, SC	198,873	94.1	29.9	37
CHARLOTTE-GASTONIA-ROCK HILL, NC-SC	484,454	95.1	26.6	50
CHICAGO, IL PMSA	2,776,385	96.1	37.7	21
CINCINNATI, OH-KY-IN PMSA	603,965	96.3	28.7	41
CLEVELAND-LORAIN-ELYRIA, OH PMSA	866,772	96.8	30.1	36
COLUMBUS, OH	549,322	96.3	26.2	55
DALLAS, TX PMSA	1,090,498	94.0	29.2	39
DAYTON-SPRINGFIELD, OH	374,057	95.9	26.6	51
DENVER, CO PMSA	733,913	97.1	35.8	26
DETROIT, MI PMSA	1,615,658	96.7	41.1	16
EL PASO, TX	197,062	91.6	39.3	19
FORT LAUDERDALE, FL PMSA	567,132	96.8	23.6	70
FORT WORTH-ARLINGTON, TX PMSA	552,948	93.9	29.2	40
FRESNO, CA	275,265	95.6	67.0	8
GARY, IN PMSA	227,173	95.7	32.5	31
GRAND RAPIDS-MUSKEGON-HOLLAND, MI	353,730	96.5	23.8	73
GREENSBORO-WINSTON-SALEM-HIGH POINT, NC	444,896	95.0	27.8	45
GREENVILLE-SPARTANBURG-ANDERSON, SC	327,930	92.3	24.1	65
HARRISBURG-LEBANON-CARLISLE, PA	236,563	97.8	20.5	87
HARTFORD, CT NECMA	425,400	97.1	19.6	90
HONOLULU, HI	280,953	98.0	39.7	18
HOUSTON, TX PMSA	1,330,969	93.7	35.9	25
INDIANAPOLIS, IN	565,912	95.5	23.6	71
JACKSONVILLE, FL	376,361	94.5	27.7	47
JERSEY CITY, NJ PMSA	210,884	93.5	48.0	13
JOHNSON CITY-KINGSPORT-BRISTOL, TN-VA	181,739	91.6	21.5	83
KANSAS CITY, MO-KS	636,113	96.7	25.5	58
KNOXVILLE, TN	254,431	94.7	19.8	92
LAS VEGAS, NV-AZ	417,940	95.8	59.6	12
LITTLE ROCK-NORTH LITTLE ROCK, AR	205,646	93.8	19.2	93
LOS ANGELES-LONG BEACH, CA PMSA	3,068,785	96.7	66.7	4

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MSA NAME	TOTAL MSA HHLDS	HHLDS WITH PHONES	PHONE HHLDS UNLISTED	PERCENT UNLISTED HHLDS
LOUISVILLE, KY-IN	385,132	95.0	23.2	74
MEMPHIS, TN-AR-MS	387,250	94.7	25.5	59
MIAMI, FL PMSA	712,421	95.1	37.4	23
MIDDDLESEX-SOMERSET-HUNTERDON, NJ PMSA	382,726	98.6	32.4	32
MILWAUKEE-WAUKESHA, WI PMSA	553,170	97.2	22.6	75
MINNEAPOLIS-ST. PAUL, MN-WI	1,016,682	98.5	17.1	97
MOBILE, AL	159,150	93.2	20.9	86
MONMOUTH-OCEAN, NJ PMSA	385,869	98.6	16.5	95
NASHVILLE, TN	405,149	95.4	22.6	77
NASSAU-SUFFOLK, NY PMSA	873,994	98.6	16.2	98
NEW BEDFORD-FALL RIVER-ATTLEBORO, MA NECMA	190,997	97.7	80.2	35
NEW HAVEN-WATERBURY-MERIDEN, CT NECMA	304,425	97.2	22.4	78
NEW ORLEANS, LA	483,910	94.0	27.9	44
NEW YORK, NY PMSA	3,267,852	93.4	34.5	28
NEWARK, NJ PMSA	594,838	96.1	34.6	27
NORFOLK-VIRGINIA BEACH-NEWPORT NEWS, VA-NC	548,029	94.3	25.9	56
OAKLAND, CA PMSA	810,042	98.0	67.3	2
OKLAHOMA CITY, OK	385,500	93.7	22.2	79
OMAHA, NE-IA	250,870	97.0	21.9	81
ORANGE COUNTY, CA PMSA	871,081	98.5	62.8	7
ORLANDO, FL	520,779	95.7	24.7	61
PHILADELPHIA, PA-NJ PMSA	1,837,191	97.5	33.6	30
PHOENIX-MESA, AZ	929,991	94.3	37.8	20
PITTSBURGH, PA	969,304	98.1	24.7	62
PORTLAND-VANCOUVER, OR-WA PMSA	659,017	97.2	44.1	15
PROVIDENCE-WARWICK-PAWTUCKET, RI NECMA	345,286	96.7	22.0	80
RALEIGH-DURHAM-CHAPEL HILL, NC	378,154	95.7	24.5	63
RICHMOND-PETERSBURG, VA	360,196	95.6	26.6	52
RIVERSIDE-SAN BERNARDINO, CA PMSA	997,309	96.0	62.3	8
ROCHESTER, NY	411,592	96.9	23.8	68
SACRAMENTO, CA PMSA	554,876	97.5	68.8	1
SALT LAKE CITY-OGDEN, UT	384,460	97.1	26.3	64
SAN ANTONIO, TX	491,954	93.1	37.6	22
SAN DIEGO, CA	941,365	97.8	65.0	6
SAN FRANCISCO, CA PMSA,	662,918	98.3	61.8	9
SAN JOSE, CA PMSA	532,580	98.8	66.6	5
SARASOTA-BRADENTON, FL	231,738	96.5	7.5	100
SCRANTON-WILKES-BARRE-HAZLETON, PA	252,264	97.9	23.6	72
SEATTLE-BELLEVUE-EVERETT, WA PMSA	870,295	98.2	37.3	24
SPRINGFIELD, MA NECMA	222,051	90.7	25.5	60
ST. LOUIS, MO-IL	969,659	96.7	24.2	64
SYRACUSE, NY	284,259	96.2	18.8	94
TACOMA, WA PMSA	239,190	97.1	44.5	14
TAMPA-ST. PETERSBURG-CLEARWATER, FL	915,977	94.7	21.7	82
TOLEDO, OH	232,033	95.7	27.7	48
TUCSON, AZ	285,849	94.2	39.8	17
TULSA, OK	296,477	98.6	25.8	57
VENTURA, CA PMSA	226,001	98.4	60.4	11
WASHINGTON, DC-MD-VA-WV PMSA	1,653,686	97.8	26.6	53
WEST PALM BEACH-BOCA RATON, FL	396,564	96.8	9.4	99
WICHITA, KS	185,600	95.7	21.1	85
WILMINGTON-NEWARK, DE-MD PMSA	200,847	97.5	29.3	38
WORCESTER-FITCHBURG-LEOMINSTER, MA NECMA	261,317	97.6	21.5	84
YOUNGSTOWN-WARREN, OH	234,271	95.8	28.6	42

Bold Face indicates the 10 MSAs with the highest incidence of unlisted phones.

NOTE: The unlisted rate is determined by comparing the estimated number of telephone households with the actual number of households found in telephone directories. Estimated telephone households are computed by taking projected household estimates at the county level calculated by Strategic Mapping, Inc. and applying a figure from the U.S. Census that indicates the percent of households with a telephone.

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EX PARTE LETTER FROM CPUC TO FCC HAND-DELIVERED AND FILED AT FCC ON APRIL 27, 1995

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION (Seal)
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 27, 1995 **BY HAND DELIVERY**

EX PARTE

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Rules and Policies Regarding Calling Number Identification Service – Caller ID, CC Docket No. 91-281

Dear Mr. Caton:

In accordance with Section 1.1206(a)(1) of the Commission's Rules, the People of the State of California and the Public Utilities Commission of the state of California ("California" or "CPUC") hereby submit for filing two copies of this letter and the attached letter to Chairman Hundt, Commissioners and staff (with attachments).

A copy of this letter and attachments is being delivered today to each of the persons listed below. This filing supplements California's *ex parte* filing date April 25, 1995, and received by the Secretary and the parties listed below on April 26, 1995.

Please make this letter and the attachments hereto part of the record.

Sincerely,

/s/ Mark Fogelman
Mark Fogelman
Principal Counsel

Attachments

cc:

Chmn. Hundt	S. Tetrault	J. Keegan	M. Katz
Comr. Barrett	J. Casserly	C. Bailey	M. Specht
Comr. Quello	J. Coltharp	R. Welch	M. DeLuca
Comr. Chong	K. Levitz	M. Bertman	M. Gordon
Comr. Ness	A. Gomez	W. Kennard	K. Brinkman
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STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION (Seal)
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

April 27, 1995 **VIA HAND DELIVERY**

Ex Parte

Hon. Reed E. Hundt, Chairman,
Commissioners and Staff
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Rules and Policies Regarding Calling Number Identification Service – Caller ID; CC Docket No. 91-281

Dear Chairman Hundt, Commissioners and Staff:

As a supplement to their *ex parte* letter to you dated April 25, 1995, and delivered to you and the Secretary on April 26, 1995, the People of the State of California and the Public Utilities Commission of the State of California (hereinafter collectively "California" or "CPUC") submit this additional letter addressing the issue of the propriety of the Commission's seeking to pre-empt California's default blocking option for non-published and non-listed telephone subscribers of per-line blocking with per-call enabling (*i.e.*, a "private" permanent presentation status with a *82 override).

California respectfully submits that any effort to pre-empt California's non-published subscriber default or to replace it with a per-call blocking default would be arbitrary and capricious and in violation of state and federal statutory and constitutional requirements.

After studying the issue, CPUC Staff is of the view that customer notice and education programs – even those as thorough and robust as the program required by the CPUC in its intrastate Caller ID decision – are unlikely to communicate information that CPN is being passed and how the customer can protect his or her privacy to more than 70% of a given population. This view is supported by a 1990 survey conducted by the Evaluation and Training Institute for the CPUC and testimony in the CPUC's Caller ID proceeding which refers to a 1990 GTE-California Community Issues and Priority Study, true copies of which are attached hereto.

Since educational programs will not reach all consumers, such programs cannot be an effective substitute for a default blocking option that will protect the privacy interests of customers who fail to receive actual notice. A default really addresses *only* those customers who fail to receive actual notice, since all customers who do receive actual notice may be presumed to have made a choice (*i.e.*, those customers who receive actual notice will either affirmatively choose a blocking option or permit the default, of which they have been informed, to make the choice for them).

California's non-published subscriber default is designed primarily to protect the interests of the 30% or more of California's approximately seven million non-published subscriber households that will not be informed by education efforts that CPN is being passed or how to protect the privacy of their unlisted telephone numbers. For these non-published subscribers who pay their local carrier each month for heightened privacy and fail to receive actual notice, a per-call blocking default would be the same as **no blocking option at all** because these people – at least 2.1 million California families and likely more – will not have been informed that they must

dial *67 each time they make a telephone call in order to preserve their privacy. The *only* way to protect the interests of these people is with the per-line blocking with per-call enabling default established for intrastate Caller ID by California.

An attempt to pre-empt California's default which results in the passage of CPN for these customers without providing them a known and understood blocking option would clearly violate their state constitutional and statutory privacy and free speech rights. For these customers, such a pre-emption decision would effectively compel and require them to disclose their unlisted telephone numbers on every call they make as a condition of using the telephone. Such compelled and involuntary disclosure of CPN would violate such customers' First Amendment right not to speak. *See Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1, 10-11 (1987) (plur. opin.); *Harper & Row v. Nation Enterprises*, 471 U.S. 524, 559 (1985), *quoting Estate of Hemingway v. Random house*, 23 N.Y.2d 341, 348 (1968). It would also violate such customers' First Amendment right to speak anonymously. *See McIntyre v. Ohio Elections Commission*, ___ U.S. ___, 63 U.S.L.W. 4279 (Apr. 19, 1995); *Talley v. California*, 362 U.S. 60, 64 (1960); *Huntley v. Pub. Util. Comm'n*, 69 Cal.2d 67, 74 (1968). It would negate such customers' reasonable expectation of privacy in their unlisted numbers and violate their constitutionally protected right of privacy in those numbers. *Cf. People v. Chapman*, 36 Cal.3d 98, 113 (1984). It would also violate the standards of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(F). And it would also violate the requirements of the Communications Act, *see* 47 U.S.C. § 152(b) and the decisions of the U.S. Supreme Court, *see Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

In addition to failing to protect the free speech and privacy rights of a substantial number of California citizens, such preemption would be arbitrary and capricious because it would be replaced a less costly blocking option with a more costly blocking option. The default chosen by the CPUC is more economical and efficient than a per-call blocking default because it represents a one-time sunk cost, while the processing costs of depressing the *67 blocking code with every call are volume- or usage-sensitive and thus recurring costs as well as costs that will inevitably require network and switch processor upgrades. *See Reply Declarations of Marvin A. Sirbu and Bridger M. Mitchell* filed by the CPUC in support of its PFR and PFR Reply in these proceedings. Such preemption would therefore result in both reduced privacy protection for people who need greater privacy protection and unnecessarily increased cost to carriers.

Nor is there any reason to suppose that California's default will limit or chill the availability of useful CPN-based business services from those who would seek to provide them. As noted in California's letter dated April 25, 1995, and attachments, the per-line blocking with per-call enabling default for non-listed and non-published customers is the choice of California business interests, including some of the country's largest banks. *See CBCHA Opening Brief* attached to April 25 letter. Nor is there any reason to assume that California's default will reduce the viability of Caller ID service in California. Testimony in the CPUC's Caller ID proceeding, based upon a study by GTEC, demonstrated that non-published subscribers purchased Caller ID service three times as much as those subscribers with published telephone numbers. *See* testimony, p. RT 2843, attached.

Like many of the parties petitioning for reconsideration herein, California has urged the Commission, in establishing standards for interstate Caller ID service, (1) to defer to the caller ID blocking regime of the originating state, subject to minimum federal constitutional privacy standards. (2) to require the passage of CPN on interstate calls free of charge, (3) to require the terminating state to honor a privacy indicator accompanying and interstate call, and (4) to establish *67 as the standardized blocking code and *82 as the standardized enabling code nationwide. California has also requested, along with the NARUC and the Pennsylvania Public Utility Commission, that the Commission stay implementation of its order on reconsideration pending appellate review. While California would be delighted if the Commission were to adopt all of California's recommendations on reconsideration, it would still be constrained to oppose any attempt to pre-empt its non-published subscriber default. In the event of any such pre-emption, California requests that such pre-emption be stayed pending appellate review or that California carriers be prohibited by the Commission from passing CPN pending appellate review. Without such a stay or prohibition, the rights of a substantial number of California citizens will be violated. California respectfully asks that the Commission consider and rule upon these points on the merits of the issues pending on reconsideration.

Sincerely,

/s/ Mark Fogelman
Mark Fogelman
Principal Counsel

Attachments

A287

SURVEY OF CALIFORNIA RESIDENTS' AWARENESS AND KNOWLEDGE OF TELEPHONE SERVICES AND COSTS

Conducted for the
Telecommunications Education Trust
Public Utilities Commission

Evaluation and Training Institute
August 1990

EXECUTIVE SUMMARY

The following report summarizes the findings from a statewide survey conducted by the Evaluation and Training Institute (ETI) for the Telecommunications Education Trust (TET). The Trust was established by the Public Utilities Commission to educate California residents over a six-year period about the telecommunications system and the service options available to them. The purpose of the survey was to establish baseline data on residents' current level of awareness to help target and evaluate the effectiveness of the consumer education campaign.

In conjunction with the TET, ETI developed a comprehensive survey covering a broad range of telecommunications issues. A total of 4000 interviews were completed by telephone using a random digit dialing sampling procedure. This sample size was selected to provide statistical validity at a 95% confidence level, plus/minus 5% error. Data were weighted according to 1990 census information in order to allow generalizability of the findings to the population of California residents. Analyses included frequencies for all respondents and cross-tabulation analyses of differences by geographic area, gender, age, income, and ethnicity.

Overall, the survey found that the vast majority of residents trust their local telephone company to provide them with accurate and reliable information. If they have questions about their telephone service, more than 80 percent of the respondents said they call their local telephone company. Most residents know that information is available in the front of the telephone book, however, awareness is low regarding

the specific types of information provided. Less than half regularly read the information inserts included in their telephone bills.

In general, the majority of respondents were aware of information related to basic telephone service and more common options such as call-waiting. However,

- *More than half of the respondents were not aware of: special services for non-English speaking customers (60%), medical monitoring via telephone (56%), and cancel call waiting (76%).*
- *Approximately 40 percent of the respondents were not aware of: private pay phones (40%), differences in charges for private pay phones (42%), call-forwarding (38%), and speed dialing (47%).*
- *The majority were not aware of their right under state law to basic, affordable telephone service (61%).*
- *More than half of the respondents did not know who regulates telephone service in California (61%).*

These findings indicate that Californians could benefit from greater information about special services, new telecommunications options, and special rates and services for low-income households.

The survey also found that more than half of the respondents were concerned about privacy issues (57%), approximately one third (35%) said they were "very concerned", especially regarding the bugging of telephone lines (51%). Other concerns included telemarketing and/or telephone surveys, party lines, and other interruptions.

Five important findings emerged from the cross-tab analysis:

- *Awareness was consistently lowest among Hispanics and residents with a primary language other than English.*
- *Awareness was generally lower among minority residents (Hispanics, Asians, Blacks) than residents who are White.*
- *Older adults (51 years and over) were least aware of new technologies such as call waiting, speed-dialing, call-forwarding, etc.*
- *Residents of rural areas were consistently less knowledgeable about telecommunications than residents in urban areas.*
- *Concerns related to privacy issues were greatest among minority residents.*

Statistically significant differences in awareness were also found according to gender, income, and geographic area.

These findings suggest that the Trust should continue to target its information efforts at minorities, particularly Hispanics and those who do not speak English as a primary language. Telecommunications awareness efforts should also be aimed at rural communities and at older adults. Finally, the study indicates that Californians are concerned about telephone privacy. More in depth information is needed in this area, particularly from minorities, who expressed the greatest privacy concerns.

- *Seven percent thought that they could not buy a telephone from their local phone company, 73% thought they could, and 20% did not know.*

Information Sources

- *Ninety-one percent of respondents are aware of the information pages in the front of the telephone book. However, fewer were aware of the specific types of information available. Twenty-seven percent were not aware of emergency information, 78% were not aware of area code maps, 79% were not aware of information regarding government services and 89% were not aware of the long distance information.*

- *Less than half of respondents "usually" read the information inserts in their phone bill (44%); 41% read them "sometimes" or "rarely" and 14% never read them. However, 82% believe the inserts provide accurate information.*

- *Eighty-four percent call their local telephone company when they want information about telephone service; a friend or relative was named by 1% each and 14% named other.*

- *Ninety-one percent believe that their local phone company is providing them accurate and reliable information; 8% did not think the information was accurate and reliable and 1% did not know.*

Services and Costs

Respondents were asked a series of questions about the availability and costs of certain services offered by their local telephone company. With respect to respondents' knowledge of services offered by their local phone company:

- *Sixteen percent said they could not get a set monthly fee for unlimited calls; 57% said they could, and 27% did not know about this service.*

- *Twelve percent said that reduced monthly fees were not available for those with low incomes; 55% said they were, and 33% didn't know.*
- *Nine percent said Lifeline service was not offered by their local phone company; 61% said it was offered, and 30% didn't know.*

CACD Ms. Purcell

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

ADMINISTRATIVE LAW JUDGE JOHN S. LEMKE, presiding.

In the Matter of the Application of Pacific Bell (U 1001 C), a corporation, for approval of COMMSTAR Features.	)	Application No. 90-11-011
	)	Application No. 90-12-065
And related matters.	)	Application No. 91-01-039

REPORTER'S TRANSCRIPT

San Francisco, California
July 19, 1991
Pages 2704 - 2809
Volume 22

Barbara A. Evanshen
Reported by: Lynn A. Stanghellin

H.C. Kaufman Jr. Official Reporter

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

505 Van Ness Avenue, San Francisco, California 94102

* * *

[p. 2784] Good morning, Mr. Mirza.

THE WITNESS: Good morning.

HASSAN MIRZA, called as a witness by the Division of Ratepayer Advocates, having been sworn, testified as follows:

ALJ LEMKE: Be seated and spell your name, please.

A My name is Hassan Mirza, H-a-s-s-a-n, M-i-r-z-a.

ALJ LEMKE: Ms. Adu.

MS. ADU: Let the record show that I have a copy of DRA's direct testimony, which is dated May 24, 1991.

I'm handing a copy to the judge and a copy for the court reporter.

ALJ LEMKE: I will mark that as Exhibit No. 54, Ms. Adu.

DIRECT EXAMINATION

BY MS. ADU:

Q Mr. Mirza, which parts of this exhibit did you prepare?

A I prepared Chapter 1, Chapter 2 except Section 2.2.5 and 2.2.6.

In addition, I prepared Chapter 3.

Q Would you turn to Appendix B, at page HMM-1.

ALJ LEMKE: That page again, Ms. Adu? I'm sorry.

MS. ADU: Page H as in Harry, M as in Mary, M as in Mary dash 1.

Q Is that a statement of your qualifications?

* * *

[p. 2808] A Or if DRA's blocking proposal is modified. In other words, the survey that we are requesting is under the assumption that DRA's blocking proposal is either modified or not accepted by the Commission.

Q So you have no further definition of what might be effective as opposed to ineffective?

A Are you asking me in terms of what will be the actual percentage effective?

If customer does not understand privacy, the blocking option and privacy implications, the customer's privacy information may be compromised.

Q Do you mean by that any particular customer, or a number of customers?

A All customers.

Q So to be effective would have to be effective with respect to a hundred percent of customers?

A I believe I did not specify exact percentage, but all customers should be made aware and understand the various services that companies are offering.

Q Utilities will be engaged in a program designed to do that, won't they?

A Well, whether it is effective or not, that's another question.

Q But you don't have any recommendation with regard to what constitutes effective or not?

* * *

CACD Ms. Purcell

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

ADMINISTRATIVE LAW JUDGE JOHN S. LEMKE, presiding.

In the Matter of the Application of Pacific Bell (U 1001 C), a corporation, for approval of COMMSTAR Features.	)	Application No. 90-11-011
	)	Applications No. 90-12-065
And related matters.	)	No. 91-01-039

REPORTER'S TRANSCRIPT

San Francisco, California
July 22, 1991
Pages 2810 - 2928
Volume 23

Reported by: William J. Harter
Robert C. Abille

H.C. Kaufman Jr. Official Reporter

PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

505 Van Ness Avenue, San Francisco, California 94102

* * *

[p. 2843] by that population of subscribers who have unlisted and nonpublished subscriber status?

A Right

Q That's correct.

A For this report, yes.

Q Are you aware that, according to Dr. Elseewi, the Kentucky take rate for CNID by nonpublished number subscribers is actually three times higher than that of subscribers with published telephone numbers.

A Well, Kentucky experience may dictate that, but in California – there's a demographic difference in California.

Comparing California to Kentucky based on the 1990 census, Kentucky as a state has a population of about 3.7 million when California's total population is about 29.8 million; in Kentucky there's 92 percent white, which represents 3.3 or 3.4 million; in California it's 69 percent white which represents 20.5 million.

In California there's more minorities than Kentucky based on these statistics, so just saying that happened in Kentucky does not necessarily mean it would happen in California.

Q Are you aware that the Kentucky experience in this regard also occurred, if you will, in New Jersey, where we ended up – it ended up with the nonpublished number subscribers ending up with a

* * *

[p. 2854] The Commission has not determined what is the appropriate blocking, whether it's the utilities or whether it's DRA or something modified.

Until that issue is resolved and until how the utility needs to undertake this CNID program, until the Commission

decides the costing and pricing issues, and until the Commission decides whether these services are Category 2 or Category 1, all those issues – until they're resolved, DRA believes that the company may be duplicating some of those efforts.

Q So then, as I understand it, DRA as standing by both of those recommendations with regard to notification programs beginning two months prior to the product offering, and also standing by this recommendation so that effectively there will be some sort of time lag issued between the decision being offered and the product being offered?

A That's correct.

Q Turning now to page 3-10, the last paragraph on that page. 3-10.

A Yes, I'm there.

Q The second sentence says:

"GTEC does not have a plan to do customer education programs through mass media. Mass media includes radio, television, local newspapers and minority-owned newspapers."

[p. 2855] I'd like to ask you some questions about the radio and television advertising.

Have you reviewed or learned of any studies which indicate that television and radio media are not very successful in reaching audiences with a message which listeners will remember? And again, our concern here, as you may well recall, GTEC has taken the position that radio and television are not effective media for purposes of the customer notification and educational programs.

Is DRA faulting GTEC for those pursuing two avenues of media?

Is DRA faulting GTEC for not pursuing those two?

A Well, I would not put the word faulting.

I'm saying DRA is concerned that the utility does not consider this. In fact, in one of the responses that DRA received, GTEC mentioned a study called California – I'm sorry, I don't know the exact title. It's a study which cited how many people understand the use by media. For example, bill inserts, 20 percent of the time people read inserts. Local newspapers, 27 percent of the time people read the newspapers. Major dailies, 24 percent. Radio, nine percent. TV, 13 percent. I didn't make the numbers.

Q Well, as a follow-up question, if GTEC could devise and implement an effective customer

* * *

[p. 2897] reference was 2-16, did I understand you to make a statement that there are no problems with Call Trace?

A I may have misspoken that part.

DRA still has on a general basis some costing and pricing concerns for categorization of certain utilities.

Q On page 2-14, the second full paragraph, Ms. Vanderpan referred you to the first sentence which reads:

> "The three utilities failed to show that per-call blocking is a balanced approach to privacy in California."

Is it your opinion that this statement should be decided by the Commission?

A Yes, this statement should be decided by the Commission, but DRA has offered its professional opinion in this statement that DRA believes that the utilities address the customers who do not understand Caller ID and who do not wish to participate in Caller ID services.

Q So, in other words, DRA has its opinion, but the Commission makes the decision?

A That's correct.

Q Also when GTEC was cross-examining you, do you recall citing statistics from a survey on the use of television and radio?

You made reference to some survey.

[2898] A That's correct.

In a data response, the Data Response No. GAPGE003, data response dated March 22nd, the data that I cannot recall the name of is a survey that is called 1990 GTE California Community Issues and Priority Survey.

Q And priority?

A Priority Survey.

Q Okay.

A I believe that's what the information which I cited was from based on this data request.

Q You were also questioned regarding Exhibit 7 which is the data from Centel, and it was brought out that there is a 5.1 percent penetration rate of Caller ID in Nevada.

How does this 5.1 percent penetration rate compare with that of other states?

A Okay. Basically the 5.1 percent is one of the highest penetration rates for Caller ID for per-line blocking or absolute per-line blocking being offered.

So with per-line blocking being offered, Caller ID service is not adversely affected.

Q Mr. Mirza, regarding your statement that BellCore is developing a new standard to allow different codes for per-call blocking and per-line unblocking, do you know about when this will be released?

* * *

EXCERPTS FROM CALIFORNIA'S UNOPPOSED MOTIONS FOR JUDICIAL NOTICE FILED IN THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, ALL OF WHICH ARE PUBLIC DOCUMENTS

Excerpts of Pacific Bell Customer Awareness Study

(From California's Unopposed Motion for Judicial Notice filed in the Ninth Circuit below on August 17, 1995)

CUSTOMER AWARENESS STUDY ON INSIDE WIRING POLICY

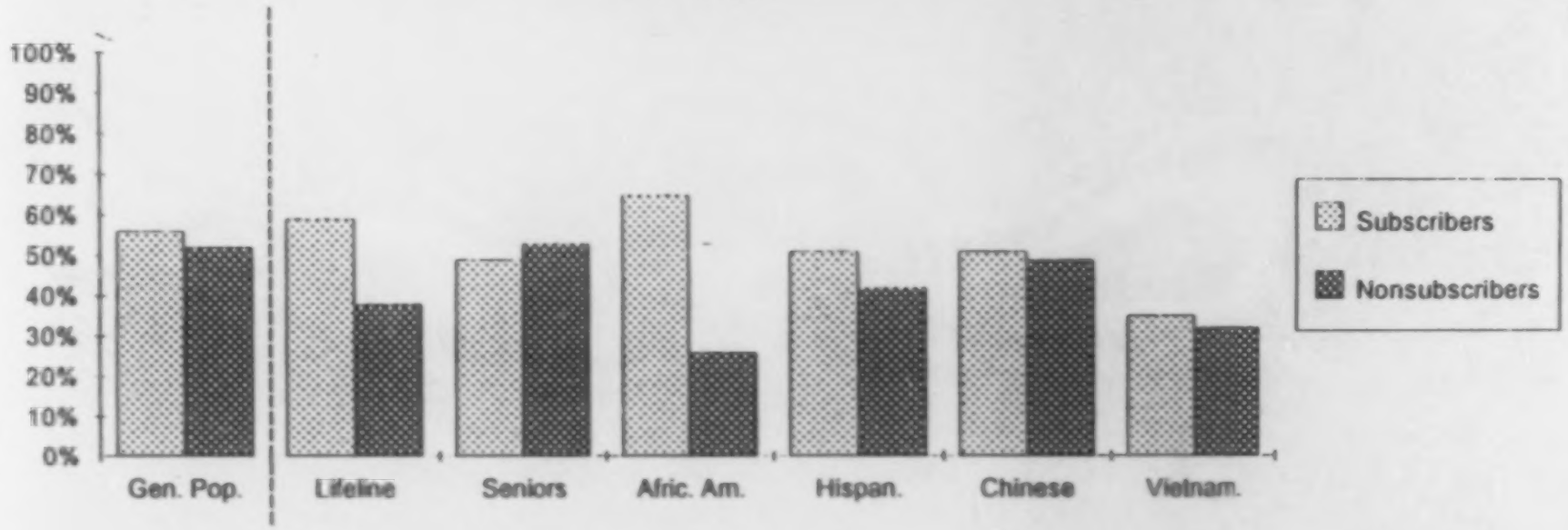
Pacific Bell Residential Customers

Prepared for
California Public Utilities Commission

May 15, 1993

Freeman, Sullivan & Co.
131 Steuart Street
Suite 500
San Francisco, CA 94105
415 777-0707
FAX 415 777-2420

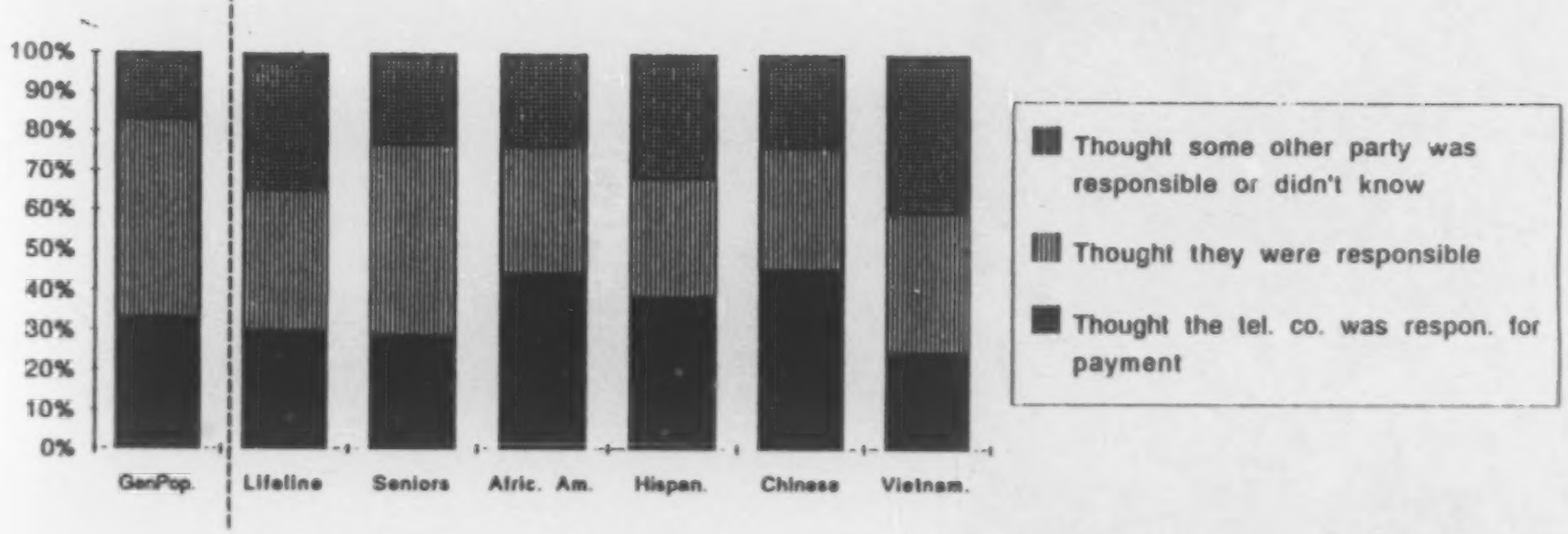
AWARENESS OF RESPONSIBILITY OF COST TO REPAIR INSIDE WIRING
(% of Subscribers and Nonsubscribers to Inside Wiring Insurance Who Answered Correctly)



- The samples for the Subscribers and Nonsubscribers in the General Population were provided by Pacific Bell.
- The subscription status of the Lifeline, Senior, African American, Hispanic, Chinese and Vietnamese populations were determined after data collection by matching the respondents' phone number to Pacific Bell's customer database.

AWARENESS OF RESPONSIBILITY FOR PAYMENT OF REPAIRS TO INSIDE WIRING AMONG NONSUBSCRIBERS

(% Who Thought the Telephone Company, They or Some Other Party was Responsible for Payment of Repair to Inside Wiring)



- The percentages in this graph are based on the portion of the subpopulations who said they did not subscribe or did not know whether they subscribed to inside wiring insurance.

- The General Population (Gen. Pop.) is a weighted average of just the Subscriber and Nonsubscriber populations, the samples for which were provided by Pacific Bell. The Lifeline, Senior, African American, Hispanic, Chinese and Vietnamese populations are separate samples and are not included in the weighted average for the General Population.

Awareness of Responsibility for Maintenance/Installation of Telephone System Components Among Nonsubscribers (% of the Subpopulations Who Thought the Telephone Company Was Responsible for Maintenance/Installation of Telephone System Components)

	General Population	*Lifeline*	*Seniors*	*African American*	*Hispanic*	*Chinese*	*Vietnamese*
Utility Service Box	73%	59%	72%	67%	65%	71%	49%
Inside Wiring	42%	46%	59%	56%	67%	65%	42%
Install. of I.W. for Addit. Phone Jacks	40%	41%	26%	52%	47%	60%	40%
Install. of Additional Jacks	36%	38%	3%	35%	46%	55%	38%
Phone Jack	20%	24%	21%	40%	33%	33%	26%
Telephone Instrument	10%	11%	16%	17%	16%	21%	7%

- The percentages in this graph are based on the portion of the subpopulations who said they did not subscribe or did not know whether they subscribed to inside wiring insurance.

- The General Population (Gen. Pop.) is a weighted average of just the Subscriber and Nonsubscriber populations, the samples for which were provided by Pacific Bell. The Lifeline, Senior, African American, Hispanic, Chinese and Vietnamese populations are separate samples and are not included in the weighted average for the General Population.

Excerpts from G.T.E. – California Customer Awareness Study

(From California's Unopposed Motion for Judicial Notice filed in the Ninth Circuit below on August 17, 1995)

CUSTOMER AWARENESS STUDY ON INSIDE WIRING POLICY

GTEC Residential Customers

Prepared for
California Public Utilities Commission

October 15, 1993

Freeman, Sullivan & Co.
131 Steuart Street
Suite 500
San Francisco, CA 94105
415 777-0707
FAX 415 777-2420

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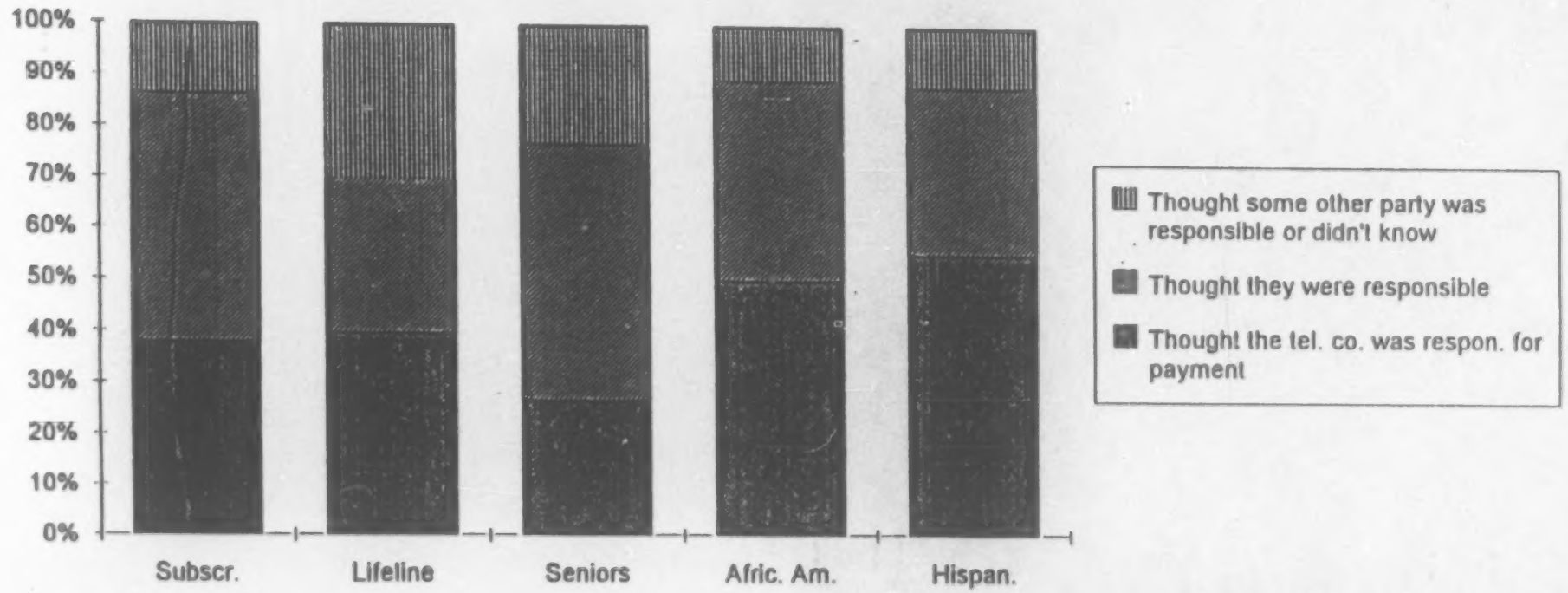
AWARENESS OF RESPONSIBILITY FOR PAYMENT OF REPAIRS TO INSIDE WIRING AMONG NONSUBSCRIBERS

(% Who Thought the Telephone Company, They or Some Other Party was Responsible for Payment of Repair to Inside Wiring)



- The percentages in this graph are based on the portion of the SUBSCRIBER population and the subpopulations who said they did not subscribe or did not know whether they subscribed to inside wiring insurance.
- The Subscriber and Lifeline population samples were provided by GTEC.
- The Subscriber population includes customers who subscribe to GTEC's inside wiring repair plan. The Lifeline, Seniors, African American and Hispanic populations include both subscribers and nonsubscribers as they occur naturally in the populations.

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Awareness of Responsibility for Payment of Repair/Installation Telephone System Components Among Nonsubscribers (% of the Subpopulations Who Thought the Telephone Company Was Responsible for Payment of Repair/Installation of Telephone System Components)

	Subscribers	*Lifeline*	*Seniors*	*African American*	*Hispanic*
Utility Service Box	54%	55%	58%	57%	50%
Inside Wiring	38%	40%	27%	50%	55%
Phone Jack	20%	21%	7%	23%	24%
Telephone Instrument	13%	8%	12%	7%	22%
Install. of I.W. for Addit. Phone Jacks	9%	19%	3%	16%	16%
Install. of Additional Jacks	3%	4%	8%	2%	7%

- The percentages in this graph are based on the portion of the SUBSCRIBER population and the subpopulations who said they did not subscribe or did not know whether they subscribed to inside wiring insurance.
- The Subscriber and Lifeline population samples were provided by GTEC.
- The Subscriber population includes customers who subscribe to GTEC's inside wiring repair plan. The Lifeline, Seniors, African American and Hispanic populations include both subscribers and nonsubscribers as they occur naturally in the populations.

Excerpts from PacBell/GTEC Customer Awareness Study

(From California's Unopposed Motion for Judicial Notice filed in the Ninth Circuit below on August 17, 1995)

Affordability of Telephone Service

Volume 1

– Non-Customer Survey –

conducted for
GTE and Pacific Bell

Field Work: September-October, 1993

Field Research Corporation
FRC

Marketing and Public Opinion Research Since 1945

Chapter 7.0 Awareness of Universal Lifeline Telephone Service (ULTS)

Examines:

Whether ever heard of ULTS

Ability to describe it correctly among those aware

Awareness of Custom Calling Services

It compares awareness of ULTS among non-customers and the matched customers.

Awareness of "Universal Lifeline Telephone Service" (Name)

	Non-Customers							
				Hispanic				
	Total	GTE	PB	Tot	LD	NLD	Black	White
	%	%	%	%	%	%	%	%
Heard of something called Universal Lifeline Telephone Service?								
Yes, heard of it	54	45	55	48	50	44	68	55
Can describe correctly (a)	40	39	40	38	40	35	47	39
Close to correct (b)	4	1	4	-	-	-	6	12
Incorrect (c)	3	1	3	1	1	2	6	3
Don't know/not reported	7	4	7	8	9	7	10	2
Not heard of it	46	55	46	52	50	56	32	45
Base	(571)	(288)	(283)	(347)	(205)	(142)	(115)	(94)
% of those aware who can volunteer —								
Correct description	74	87	73	79	80	80	69	71
Close to correct (cum)	81	89	80	79	80	80	78	93

Awareness of "Universal Lifeline Telephone Service" (Name) *Table 7.1*

Non-customers were asked if they had ever heard of something called Universal Lifeline Telephone Service. Those who said they had were than asked to describe, open-ended, what they think it is and who they think it is for.

Responses are shown opposite.

Highlights

Slightly more than half (54%) of the non-customers say they have heard of a service called Universal Lifeline Telephone Service. The large majority of those aware could volunteer the correct description, i.e. that it is for low income persons and/or that it is a lower rate service. A few more offer a description that suggests they may know what it is, i.e. that it is a limited call service and/or for older persons.

Thus, 40% are aware of the name *and* can volunteer (correctly) what it is.

46% have never heard of the name, Universal Lifeline Telephone Service.

By company: Pacific Bell non-customers are more aware of the name than GTE non-customers (55% vs. 45%), but fewer of those aware could correctly describe it so that the percentage aware AND able to describe correctly is about the same for both companies: 40% and 39% respectively.

By ethnicity/race: Black non-customers have higher awareness of the name (68%) than Whites (55%), and considerably higher than LD Hispanics (50%) or NLD Hispanics (44%). However, Blacks and Whites are somewhat less able to come

up with the correct description than Hispanics with the result that the percentage aware and able to describe correctly is more nearly the same across the groups: 47% Black, 40% LD Hispanic, 39% White and 35% NLD Hispanic.

Awareness of ULTS Among Matched Customers

	Matched Customers							
				Hispanic				
	Total	GTE	PB	Tot	LD	NLD	Black	White
	%	%	%	%	%	%	%	%
Heard of something called Universal Lifeline Telephone Service?								
Yes, heard of it	69	63	69	67	72	60	79	64
Say have it now	47	41	47	43	41	46	52	51
Don't say have it	22	23	22	24	31	15	27	12
Can describe correctly (a)	14	17	14	17	24	7	13	7
Close to correct (b)	1	1	1	*	*	-	4	-
Incorrect (c)	3	1	3	2	1	4	4	3
Don't know/not reported	5	4	5	5	6	4	6	3
Net: Say have/correct	61	58	61	60	65	53	65	58
Not heard of it	32	37	31	33	28	40	21	36
Base	(566)	(287)	(279)	(347)	(201)	(146)	(112)	(98)
% of those aware but DO NOT SAY HAVE IT who can volunteer —								
Correct description	64	74	64	71	77	47	48	58
Close to correct (cum)	68	78	68	71	77	47	63	58

Awareness of ULTS among Matched Customers *Table 7.2*

Matched customers were asked the same question as customers.

Responses are shown opposite.

Highlights

69% of the matched customers have heard of a service called Universal Lifeline Telephone Service: within this group, 47% claim to have it and 22% do not, but are aware of it. Most of the DON'T HAVE, BUT AWAREs can describe it correctly; as a result, 61% of the matched customers are aware of this service by name and can correctly describe it (as compared to 40% for non-customers).

By company: Awareness of ULTS among matched customers is the same for both companies. (Differences are not statistically significant.)

By ethnicity/race: Among matched customers, awareness of the name ranges from a high of 79% among Blacks to 60% among NLD Hispanics.

Awareness of ULTS: Non-Customers vs. Matched Customers

	Total			GTE			PB		
		Customers			Customers			Customers	
	Non-Cust	Total	Don't Have	Non-Cust	Total	Don't Have	Non-Cust	Total	Don't Have
	%	%	%	%	%	%	%	%	%
Heard of ULTS —									
Yes, heard of it	54	69	41	45	63	37	55	69	42
Say have it now	-	47	-	-	41	-	-	47	-
Don't say have it	54	22	41	45	23	37	55	22	42
Can describe correctly (a)	40	14	25	39	17	29	40	14	25
Close to correct (b)	4	1	2	1	1	1	4	1	2
Incorrect (c)	3	3	5	1	1	1	3	3	5
Don't know/not reported	7	5	10	4	4	6	7	5	10
Net: Say have/correct	40	61	25	39	58	29	40	61	25
Not heard of it	46	32	59	55	37	63	46	31	59
Base	(571)	(566)	(285)	(288)	(287)	(159)	(283)	(279)	(126)
% Aware but don't say have it who can volunteer —									
Correct description	74	64	61	87	74	78	73	64	60
Close to correct (cum)	81	68	66	89	78	81	80	68	64

Awareness of ULTS: Non-Customers vs. Matched Customers

Table 7.3

The table opposite shows awareness of ULTS among non-customers and matched customers.

Highlights

Among all groups, matched customers have higher awareness of ULTS than non-customers. However, among those aware of the name, non-customers tend to be better able to say what it is than customers.

NOTE: Caution is urged in comparing awareness of ULTS among customers and non-customers:

The fact that customers have higher awareness does NOT indicate that it is this higher awareness that CAUSED them to get phone service because the causal relationship is not clear, i.e. one cannot assume that it is higher awareness among customers that caused them to get ULTS. They could be more aware because they have contacted the phone company and have phone service.

Probe for Awareness of Special Service for Lower Income People

	Matched Customers							
				Hispanic				
	Total	GTE	PB	Tot	LD	NLD	Black	White
	%	%	%	%	%	%	%	%
Heard of ULTS	69	63	69	67	72	60	79	64
Say have it	47	41	47	43	41	46	52	51
Don't say have it	22	23	22	24	31	15	27	12
Can describe correctly	14	17	14	17	24	7	13	7
Cannot describe correctly	8	6	8	7	7	8	14	5
Have not heard of	32	37	31	33	28	40	21	36
Total: Say have or can describe	61	58	61	60	65	53	65	58
Not aware or can't describe ULTS	40	42	40	40	35	47	35	42
Aware "low income service"	12	13	12	12	16	8	11	13
Say have it	5	5	5	6	10	1	4	3
Don't say have it	7	8	7	6	6	7	7	10
Base	(566)	(287)	(279)	(347)	(201)	(146)	(112)	(98)
% of those NOT AWARE of ULTS who are —								
Aware "low income service"	30	31	30	30	46	17	31	31

7.4

Probe for Awareness of Special Service for Lower Income People *Table 7.4*

Customers who had not heard of ULTS (or had heard of it but could not volunteer the correct description) were asked this follow-up question:

> *"Are you aware that the phone company offers a special type of phone service for lower income people?"*

Due to an error in the SKIP instructions printed on the questionnaire, non-customers were not asked this follow up probe. As a result, while we have awareness of ULTS (name) among non-customers, we do not have awareness of the more generic concept of a special service for lower income people among non-customers. We can, however, examine the extent to which the above probe INCREASED awareness of this type of service among *customers*. We can then use this measurement to provide an improved estimate of what awareness might have been had non-customers been asked the question. The analysis assumes that the increase among non-customers could be less than among customers, but, logically, it could not be more.

Highlights

Among *customers*: When customers who are not aware of ULTS or are aware, but cannot correctly describe it (40% of all customers) are asked if they are aware the phone company offers a special service for lower income persons, 30% say they are (30% of 40% = 12%). Thus, the probe adds another 12% to awareness among customers. This brings total awareness of this type of service to 73% among customers: 47% have it, 14% don't have it but are aware and can correctly describe it and another 12% are aware of a low income

service. The large majority of those not aware of the name are also not aware there is a low income service.

These data from customers suggest that the MOST the probe could have done among non-customers would have been to increase awareness of a ULTS type service by 30% of those not aware of the name. Applying this logic, one can provide an improved estimate of what the highest awareness among non-customers would have been if the probe had been asked. This is done on the following page.

Awareness of ULTS, Low Income Service and CCS (Summary)

	Total	GTE	PB	Hispanic Tot	Hispanic LD	Hispanic NLD	Black	White
	%	%	%	%	%	%	%	%
Non-customers								
Aware ULTS and can correctly describe it	40	39	40	38	40	35	47	39
*Aware ULTS or a low income service (adjusted)	58	58	58	57	68	46	63	58
Aware CCS	76	71	76	75	80	68	84	71
Base	(571)	(288)	(283)	(347)	(205)	(142)	(115)	(94)
Matched customers								
Aware ULTS and can correctly describe it	61	58	61	60	65	53	65	58
Aware ULTS or a low income service	73	71	73	72	81	61	76	71
Aware CCS	84	82	85	87	89	85	88	77
Base	(566)	(287)	(279)	(347)	(201)	(146)	(112)	(98)
Customers with "Say Have ULTS" removed								
Aware ULTS and can correctly describe it	25	29	25	30	42	13	30	12
Aware ULTS or a low income service	43	46	43	46	60	27	46	36
Aware CCS	86	78	87	88	88	89	86	85
Base	(285)	(159)	(126)	(189)	(103)	(86)	(44)	(48)

Awareness of ULTS, Low Income Service and CCS (Summary)

Table 7.5

Highlights

The table opposite shows the percentage of non-customers aware of ULTS and able to correctly describe it (40%). On the next line, it shows the "adjusted awareness" of this type of service by applying what the probe did to awareness among customers to non-customers.

As shown there, awareness of this type of service among non-customers if the probe had been used would almost undoubtedly be more than the 40% (aware ULTS and describe correctly) but it would NOT be higher than 58% (the adjusted figure).

Non-customers were also asked if they had ever heard of Custom Calling Services like Call Waiting. (See next page.) As shown opposite, 76% of the non-customers say they have heard of these. Thus, awareness of Custom Calling Services among non-customers is higher than the highest estimate of awareness of ULTS if non-customers had been asked the probe.

It is also important to note that non-customers as a group are almost as aware of Custom Calling Services as are customers: 76% vs. 84%. This finding suggests that, had the probe been included, awareness of ULTS among non-customers would probably be closer to the 58% (more like customers) than to the 40%.

NOTE: The failure to ask the probe was due to a clerical oversight in the final proofing of the questionnaire; Field Research very much regrets the error and has tried, in this analysis, to provide the best estimate of awareness of the generic service using the data available.

Awareness of Custom Calling Services

	Total	GTE	PB	Hispanic			Black	White
				Tot	LD	NLD		
	%	%	%	%	%	%	%	%
Non-customers								
Have heard of CCS	76	71	76	75	80	68	84	71
Aware cost extra/are optional (a)	91	90	91	87	84	93	94	97
Not aware of this (a)	9	10	9	13	16	7	6	3
Have not heard of CCS	25	29	24	25	20	32	16	29
Base	(571)	(288)	(283)	(347)	(205)	(142)	(115)	(94)
Matched customers								
Have heard of CCS	84	82	85	87	89	85	88	77
Aware cost extra/are optional (a)	91	88	91	90	88	92	89	97
Not aware of this (a)	9	12	9	10	12	8	11	3
Have not heard of CCS	16	18	15	13	11	15	12	23
Base	(566)	(287)	(279)	(347)	(201)	(146)	(112)	(98)

Awareness of Custom Calling Services *Table 7.6*

The table opposite shows awareness of Custom Calling Services and, among those who are aware, whether they are aware that they cost extra and are optional.

Highlights

Awareness of Custom Calling Services is high among non-customers (76%) as well as among matched customers (84%).

Most of those aware of Custom Calling Services know that they are optional and that one pays extra for them. About one in ten non-customers is not aware of this – about the same as for matched customers.

By company: Awareness is equally high for both companies.

By ethnicity/race: Black and LD Hispanic non-customers are more aware of Custom Calling Services than are White or NLD Hispanic non-customers: 84% and 80% vs. 71% and 68% respectively. While the large majority of non-customers aware of CCS know that they are optional and cost extra, LD Hispanics are less aware of this than others (16% not aware).

Pacific Bell Tariff Sheets Relating to Nonpublished Service and the Use of Nonpublished Information

(From California's Unopposed Motion for Judicial Notice filed in the Ninth Circuit below on August 17, 1995)

Pacific Bell
San Francisco, California

SCHEDULE CAL.P.U.C. NO. A2.
1st Revised Sheet 136
In Lieu of Original Sheet 136 Rejected

NETWORK AND EXCHANGE SERVICES
A2. GENERAL REGULATIONS

2.1 RULES (Cont'd)

2.1.34 RULE NO. 34 – NONPUBLISHED SERVICE – RELEASE OF INFORMATION

A. RELEASE OF INFORMATION

1. Nonpublished Service

California Public Utilities Commission's Decision Nos. 92860 and 93361, in Case No. 10206, requires that each communications Utility, operating under the jurisdiction of the Commission, include the provisions of the rule set forth in Appendix "A" of that decision as a part of the rules in the Utility's tariff schedules. Accordingly, Appendix "A" of Decision Nos. 92860 and 93361, Case No. 10206 is quoted herein:

APPENDIX 'A'

Nonpublished Service

a. Definition of nonpublished service: Upon a customer's request, customer name, address, and telephone number are not listed in any telephone directory, street address directory, or in the

directory assistance records available to the general public. This information, as well as call-forwarding information from such unlisted telephone numbers, shall be released by telephone utilities in response to legal process or to certain authorized governmental agencies provided the requesting agency complies with the rules herein established for the release of nonpublished information.

b. Agencies authorized to receive nonpublished information:

(1) Any California public agency which employs persons who are peace officers pursuant to California Penal Code Section 830 and all subsections thereof.

(2) An agency of the federal government which is lawfully authorized to:

- Conduct investigations or make arrests for violations of the criminal laws of the United States; or,
- Prosecute violations of the criminal laws of the United States; or,
- Enforce civil sanctions which are ancillary to criminal statutes; or,
- Conduct investigations into matters involving the national security of the United States; or,
- Protect federal or foreign officials, or,
- Protect public health and safety or,
- Conduct emergency rescue operations.

(3) Any public health agency of the State of California or of a city, county, or other local government.

(4) County or city 911 projects.

(5) State Fire Marshall and Local Fire Departments or Fire Protection Agencies.

(6) Collection agencies, to the extent disclosures made by the agency are supervised by the Commission, exclusively for the collection of unpaid debts.

(7) California Public Utilities Commission pursuant to its jurisdiction and control over telephone and telegraph corporations.

c. Procedure for release of nonpublished information to authorized agencies.

(1) A telephone utility shall only provide nonpublished information to persons within authorized agencies who are either

- Peace officers pursuant to California Penal Code Section 830 and all subsections thereof and who are lawfully engaged in a criminal investigation in their official capacity, or

- Health officers who are acting in their official capacity and are lawfully investigating a matter involving a serious communicable disease or life-threatening situation, or

- Employees of an authorized federal agency acting in an official capacity pursuant to a responsibility enumerated in b.(2) preceding, or

- Employees of a county or city 911 project when acting in an official capacity, or

- Employees of an agency listed in b.(5) preceding when engaged in an investigation involving arson or when engaged in firefighting duties in which there is immediate peril to life or property.

(2) Nonpublished information shall be released by a telephone utility to an authorized agency upon the agency's written request provided that the agency has previously furnished the utility with a statement, signed by the head of the agency, requesting that nonpublished information be provided to the agency upon its written request, and listing designated persons, by name, and title, who are authorized to request, in writing, nonpublished information. The written request for the nonpublished information must be signed by the head of the agency or by a previously designated person and the request must state that the nonpublished information is necessary for a lawful investigation being conducted by the agency pursuant to its responsibilities.

(3) Nonpublished information shall also be released by a telephone utility to an authorized agency upon the agency's telephonic request, provided the agency has previously furnished the utility with a statement. It must be signed by the head of the agency, requesting that nonpublished information be provided to the agency upon telephonic request and listing designated

persons, by name, title, and telephone number, who are authorized to request, by telephone, nonpublished information. The telephonic request for nonpublished information must be made by the head of the agency or by one of the previously designated persons.

The nonpublished information requested by telephone shall be provided by the utility only on a call-back verification basis.

The requesting agency shall, within five working days after making the telephonic request, mail the utility a letter confirming the request.

d. Notification to Customer

(a) The telephone utility shall not notify a customer regarding the release of customer's nonpublished information unless the customer contacts the utility and specifically requests to know whether their nonpublished information has been released.

(2) When a customer inquires of the utility whether their nonpublished information has been released, the customer shall be informed that if information has been released they will be notified by mail about what information was released and which agency requested the information. If there was no release of nonpublished information, the customer will receive no communication from the utility.

(3) If requesting agency certifies that disclosure to a customer about the release of his or her nonpublished information to that agency could impede an ongoing criminal investigation, the telephone utility shall

withhold notice to the customer for a period of one year from the date of release of the information to the agency.

(4) The one-year period of nondisclosure shall be extended for successive one-year periods upon new written certification by the agency in each instance.

(5) If no request has been made for nondisclosure to the customer, the customer who inquires shall be notified in writing as to the identity of the agency which requested the nonpublished information and the information released.

If there has been a request for nondisclosure within 25 working days after the expiration of any outstanding certification for nondisclosure, or any renewal of such certification, a customer who has previously inquired, at any time during the period of nondisclosure, whether their nonpublished information was released, shall automatically be notified in writing by the utility that such information was released and which agency received this information.

e. Exception for Health Officers

No notification shall ever be made to a customer that nonpublished information was released to an authorized public health agency provided the chief health officer or designated health officer from the agency certifies that disclosure to the customer could violate a client's or contact's right of privacy and confidentiality.

f. Release of Information to Interexchange Carriers

The Utility will provide nonpublished information to an Interexchange Carrier who needs the information for allocation, billing or service purposes as set forth in Schedule Cal.P.U.C. No. 175-T.

g. Retention of Records

All written documents pertaining to nonpublished service shall be retained by telephone utilities for at least one year. When an agency requests that notice to the customer be withheld, the telephone utility shall retain the records involved for a period of not less than one year from the date on which the period of nondisclosure expires.

h. Unsolicited Telephone Efforts

The Utility will not contact nonpublished residence customers by telephone on an unlisted numbers(s) for unsolicited sales efforts.

Pacific Bell SCHEDULE CAL.P.U.C. NO. A5.
San Francisco, California 1st Revised Sheet 524
In Lieu of Original Sheet 524 Rejected

NETWORK AND EXCHANGE SERVICES
A5. EXCHANGE SERVICES

5.8. OPERATOR SERVICES

5.8.1 LOCAL OPERATOR VERIFICATION/INTERRUPT SERVICE

Where facilities and operating conditions permit, the Utility's Toll Operators may verify a busy line condition and/or interrupt a conversation in progress at the calling party's request. The charges for such service are $.50 to verify and $1.00 to interrupt.

No charge will apply to the following:

When the Operator finds the called telephone line to be out of order.

To place a call to or from any public agency whose responsibility it is to provide or render emergency aid.

5.8.2 NON-PUBLISHED NUMBER REPORT

Upon request of an urgent or emergency nature, the Utility Operator will arrange to attempt to reach the requested non-published number subscriber with the calling party's name and number. The non-published subscriber may agree to call back, or the calling party will be contracted by the Utility and informed the non-published subscriber is unwilling to call back or is unavailable.

The charge to the requesting party is $2.50 per request and is applied to the following:

The non-published number search, contacting the non-published subscriber and the report back to the calling party when the non-published subscriber refuses to contact the requesting party; or

The non-published number search and contacting the non-published subscriber when the non-published subscriber does not refuse to contact the requesting party.

For a charge to apply, each task listed under either item preceding must be completed by the Utility.

No charges will apply to the following:

The non-published subscriber cannot be reached by the Utility after three attempts.

When the non-published subscriber refuses to contact the requesting party and the Utility fails to report back to the requesting party.

The operator will notify the requesting party of the applicable charges at the time such a request is made.

Date Filed: MAR 4 1985
Advice Letter No. 14889 Effective: APR 18 1985
Decision No. Resolution No. T10914
Issued by
Robert B. Roche
Executive Director – State Regulatory

Excerpt from Pacific Bell Notice of Ex Parte Communication Filed with CPUC on September 15, 1995

(From California's Unopposed Supplemental Motion for Judicial Notice Filed in the Ninth Circuit below on October 10, 1995)

Caller ID – Customer Notification and Education

To proceed with customer notification, several issues needed to be resolved . . .

- There should be no linkage between customer notification and litigation in the 9th circuit court

  The CPUC staff has indicated that Pacific's notification plan should describe the steps that will be taken in the event that the CPUC prevails in the litigation. This appears to connect our plan with the litigation. Pacific Bell cannot predict the impact of court action.

- The Commission should provide timely review of the notification plan and resulting awareness levels

  Pacific has proposed a formal 30 day review period for our plan and a 17 day review period for the resulting awareness levels. The staff has indicated that more time is likely to be required. Pacific would like to present an aggressive schedule to the FCC in our request for an extension. Timely review by the CPUC is very important. (See attached timelines)

- Z-Factor treatment is appropriate for extraordinary notification costs

  Customer Notification is a regulatory requirement linked to the passage of Calling Party Number. The CPUC requirements will result in approximately $30M of notification expense. This is an extraordinary cost to Pacific Bell that should be considered for Z-factor treatment.

- The Commission should have reasonable expectations on consumer awareness levels

  Pacific Bell is prepared to devote significant resources to customer notification. Nevertheless, it is unreasonable to expect that 100% awareness is achievable. The survey of awareness will be most useful in determining the type of ongoing customer education that is needed.

Excerpt from Pacific Bell Customer Notice and Education Plan Filed with CPUC on October 11, 1995

(From California's Unopposed Second Supplemental Motion for Judicial Notice Filed in the Ninth Circuit Below on October 16, 1995)

PACIFIC BELL

CUSTOMER NOTIFICATION AND EDUCATION PLAN ON CPN DELIVERY

OCTOBER 11, 1995

CPN CONSUMER EDUCATION:
Evaluation Process

Awareness Estimate:

The Pacific Bell CPN Education Campaign will provide notification to 100% of our customers through bill inserts. In addition, the proposed media plan reaches 97% of our customers an average of 33 times with our education message.

Current awareness levels of the ability to block number delivery, and the fact that numbers will be delivered (as determined in our benchmark survey in July) are 19% and 28% respectively, among residential customers. We expect to increase those numbers significantly, perhaps even double the current percentages. However, it is physically impossible to obtain 100% awareness.

Our estimated awareness levels as a result of this Education Plan are:

- 25-40% aided awareness of the ability to block number delivery
- 50-65% aided awareness that numbers will be delivered

Estimating projected awareness for an educational/informational message, is not a scientific formula. It is only an estimate, based on our collective experience and historical data. For perspective, a similar education campaign we conducted for IRD, with roughly the same media weight at high reach and frequency levels, achieved 49% overall awareness, an increase of 19 points above the original 27% benchmark awareness level.

We have every confidence that our CPN Education media plan (including television, radio, magazines and newspapers in

five languages) combined with the outreach programs directed to the hard-to-reach segments of the market, will generate the significant level of awareness of blocking options that both we and the Commission are seeking.

EXCERPT FROM INTERVENORS BRIEF OF PAC BELL AND GTEC IN SUPPORT OF FCC FILED IN NINTH CIRCUIT BELOW ON SEPTEMBER 27, 1995

California imposes this default for all "non-published" subscribers – approximately 50% of all California telephone customers. Thus, under the California default position, half the population would be outside of Caller ID.

CURRENT TELEPHONE COMPANY STATISTICS ON NONPUBLISHED AND UNLISTED TELEPHONE NUMBERS

Pacific * Bell
A Pacific Telesis Company

Steven M. Schuppert
Director
Access & Competitive Services

San Francisco, California 94105
(415) 542-4317
Fax (415) 546-4119

July 5, 1995 (U 1001 C)

Mr. Jack Leutza
Commission Advisory and Compliance Division
California Public Utility Commission
505 Van Ness Avenue, Room 3203
San Francisco, CA 94102

Dear Mr. Leutza,

This is in response to your June 23, 1995, request for information regarding unlisted and non-published residential services. As of June 30, 1995, the following statistics regarding Pacific Bell's residential service should provide the specific information you requested:

	SOUTH	***NORTH***	***TOTAL***
RESIDENCE LINES			
Total Lines	4,584,460	5,161,793	9,746,253
Omit Address	1,849,252	1,376,486	3,225,738
DA Only	25,876	32,800	58,676
Non-Pub	2,227,214	2,497,728	4,724,942

RESIDENCE ACCOUNTS			
Total Accounts	4,478,689	5,084,404	9,563,093
Multiple Lines	88,456	67,906	156,362
Multiple Lines w/Non-Pub	608	453	1,061

If you have any questions about the information being provided, please call me.

/s/ S.M. Schuppert

cc: M.J. Purcell

A340

(LOGO) **GTE California Incorporated**

One GTE Place
Thousand Oaks,
CA 91362-3811
805 372-6000

CA50OGCC

July 3, 1995

Ms. M. J. Purcell
California Public Utilities Commission
505 Van Ness Avenue, Room 3D
San Francisco, CA 94102

Dear Ms. Purcell:

The following is in response to your data request, received June 28, 1995, regarding multiple line residential customers and nonlisted, nonpublished customer listing information.

Question 1: Provide the number of households subscribing to more than one line (this number should include households with any mix of service, i.e., two residential lines, or a mix of residential and business lines).

Response: 338,210 Households

Question 2: Provide the number of multiple-line households who subscribe to either an unlisted or non-published number.

Response: 299,349 Households

Question 3: Provide the current residential line total at your utility.

Response: 2,549,062 Lines

Question 4: Provide the current number of residential lines subscribing to non-published or non-listed number service.

Response: 1,858,442 Lines

The above responses represent actual customer billing data as of June 30, 1995.

If you have any questions regarding this information, please contact me on (805) 372-7072.

Sincerely,

/s/ Kurt R. Rasmussen
Kurt R. Rasmussen
Regional Staff Administrator –
Regulatory Affairs

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. IX

The enumeration in the Constitution, or certain rights, shall not be construed to deny or disparage others retained by the people.

Cal. Const., Art. I, § 1

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 152(b)(1)

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 or 224 and 225 of this title and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .

Supreme Court, U.S.
FILED
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(4)

No. 95-1514

In the Supreme Court of the United States

OCTOBER TERM, 1995

CALIFORNIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's preemption of a California rule governing calling number identification (caller ID) service for nonpublished telephone subscribers effects an impermissible intrusion upon the prerogatives of the State.

2. Whether the Commission's preemption of the California rule violates the privacy and free speech rights of California telephone subscribers.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A32) is reported at 75 F.3d 1350.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1996. The petition for a writ of certiorari was filed on April 19, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Calling number identification (caller ID) service permits a telephone customer who receives a call to see, with the aid of a display device attached to or incorporated into its telephone, the telephone number

of the person who placed the call. Caller ID service is made possible by the refinement of techniques for the transmission of the calling party number (CPN) during the setup of calls, both local and long-distance.[1] In a rulemaking proceeding to develop rules and policies for the implementation of caller ID and related services nationwide, the Federal Communications Commission (FCC or Commission) adopted the orders at issue in this case. In those orders, the Commission, *inter alia*, established procedures by which telephone subscribers may choose *not* to have their CPN transmitted to the parties they call. Those procedures, which seek to balance the often conflicting privacy interests of called and calling parties, generally favor the transmission of CPN in the absence of a deliberate and conscious choice by the calling party not to have its CPN transmitted.[2]

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[1] Those refinements in the transmission of CPN permit a wide variety of benefits to consumers in addition to caller ID service. For example, businesses can significantly expedite customers' orders or inquiries via computer programs that instantly retrieve the caller's name, address, and billing information. Customer calls to national business or non-profit centers can be transferred immediately to the local branch office most convenient to the caller. Ambulances can be dispatched more quickly. In general, the public can benefit from a variety of CPN-based services that allow individuals to obtain information and transact business more quickly and accurately. See Pet. App. A39.

[2] The Commission in its notice of proposed rulemaking initiating the caller ID proceeding identified privacy interests of both the called party and the calling party and announced its intention to balance those interests in formulating a federal policy or rule. See *Rules and Policies Regarding Calling Number Identification Service*, Notice of Proposed Rulemaking, 6 FCC Rcd 6752, 6755-6757 (1991).

Because CPN information automatically enters the telephone network during the call setup process, a choice by the calling party not to have its CPN revealed to the called party requires some method of blocking the CPN before it can reach the called party's display device. "Per call blocking," which presupposes that CPN will be transmitted as a general rule, allows a calling party to block disclosure of its CPN on any particular call by dialing certain numbers (*67) before placing the call. "Per line blocking," by contrast, presupposes that as a general rule CPN will not be disclosed. Under that system, disclosure of a calling party's CPN is blocked on all calls from its telephone line unless the caller dials certain numbers (*82) to countermand the blocking before placing an individual call. See Pet. App. A57-A66. As an accommodation to States that had adopted per line blocking procedures for intrastate calls, the FCC's policy permits customers to choose either per call blocking or per line blocking so long as the methods for overriding per line blocking are uniform.[3]

The narrow dispute in this case concerns the form of blocking that applies, as a "default" mechanism, when subscribers to telephone service with unpublished numbers have not chosen either per call block-

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[3] Existing technology does not permit per line blocking for intrastate calls and per call blocking for interstate calls on the same line. The Commission at first considered preempting any state regulation that would have permitted per line blocking. On further consideration, the Commission decided to accommodate the per line blocking policies that a number of States had adopted, as long as the carriers offering per line blocking also offered callers a means of unblocking the passage of CPN on individual calls by dialing a set of numbers that would be uniform nationwide. See Pet. App. A87, A132-A135.

ing or per line blocking. The FCC's rules and policies for interstate caller ID require that CPN should be transmitted unless the calling party has made an affirmative choice to block it, either by selecting per line blocking or by dialing the appropriate prefatory numbers to block transmission of CPN on an individual call. That FCC policy choice can be effectuated only if per call blocking is used as the default mechanism for subscribers who have not chosen either of the two options.

California's rules governing intrastate offerings of caller ID employ a contrary default policy for a narrow category of subscribers. Under California's rules, customers with unpublished numbers who do not choose a method of blocking would be given per line blocking. The Commission in this case preempted California's default blocking rule for unpublished numbers to avoid frustration of its own federal policies for interstate caller ID and the balance those policies had achieved among the competing privacy interests of calling and called parties. See Pet. App. A135-A144. California challenged the Commission's preemption order by filing a petition for review in the United States Court of Appeals for the Ninth Circuit.[4]

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[4] Caller ID is not yet available in California, although it is offered in some form in 47 States and the District of Columbia. The dispute over customer education programs and blocking procedures between California and the carriers offering telephone service in that State has delayed the implementation of this valuable service both as an intrastate service in California and as a part of the interstate service offered elsewhere under the FCC's rules and policies. Pet. App. A137-A138 (quoted at Pet. App. A19-A20).

2. The court of appeals denied the petition for review. Pet. App. A1-A32. The court first held that the Commission had not impermissibly intruded upon the State's authority in preempting the California regulation. The court pointed out that the FCC had "narrowly tailored" its preemption to fit federal policies, and that it had exercised its discretion reasonably by considering relevant factors and by referring to support in the record. *Id.* at A21. The court recognized that, while the FCC is generally precluded from regulating intrastate communications, see *id.* at A17-A18, an exception to that general rule permits preemption of state law "where it is 'not possible to separate the interstate and intrastate components of the asserted FCC regulation,'" *id.* at A18 (quoting *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 375 n.4 (1986)). On the basis of the Commission's uncontested determination that it was infeasible to establish different blocking schemes for interstate and intrastate calls that originate from the same line, see Pet. App. A14 & n.11, the court concluded that the FCC's preemption of California law fit within that "impossibility exception," *id.* at A21.

The court of appeals also rejected petitioners' contention that the Commission's preemption order violated the privacy and free speech rights of California telephone subscribers. The court held that a calling party's telephone number "is not among the select privacy interests protected by a federal constitutional right to privacy." Pet. App. A23. Relying on decisions of this Court and three state supreme courts, the court of appeals concluded that the FCC's preemption rule "does not violate any cognizable privacy interest." *Id.* at A24. The court held that the FCC's rule does not violate a First Amendment "right not to

speak" because it does not require callers to express adherence to an unacceptable point of view. *Id.* at A24-A25. The court also concluded that the FCC's rule "does not compel disclosure of the identity of a person who exercises his or her freedom of expression" and thus does not violate any constitutional "right to speak anonymously." *Id.* at A26.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court. Nor is the issue one of recurring importance; to the contrary, petitioners themselves assert (Pet. 9) that "the Court is unlikely to see these issues again under any circumstances" because "California is the only state in the country to have adopted a per line blocking default for nonpublished customers." Further review is not warranted.

1. Petitioners first contend (Pet. 10-13) that the Commission's preemption of California law effects an impermissible intrusion on the sovereignty of the State. Relying on well-established precedent with respect to telephone regulation, the court of appeals recognized that the FCC is empowered to preempt state law where the interstate and intrastate aspects of the Commission's regulatory scheme cannot be separated. Pet. App. A18 (citing *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355, 375 n.4 (1986)). Cf. *City of New York* v. *FCC*, 486 U.S. 57 (1988) (upholding FCC preemption of technical standard for the transmission of cable television signals). The courts of appeals have applied that rule consistently, upholding FCC preemption of state regulations where valid federal interstate regulations cannot coexist with state regulations that purport to address only

intrastate matters. See, *e.g.*, *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 113-116 (D.C. Cir. 1989); *California* v. *FCC*, 39 F.3d 919, 931-933 (9th Cir. 1994), cert. denied, 115 S. Ct. 1427 (1995). The Commission explained in the order under review that "it is not feasible to have different [caller ID] default policies for interstate and intrastate calls." Pet. App. A136; see *id.* at A125. Petitioners have not contested that determination either in this Court or in the court of appeals. See Pet. 12; Pet. App. A14 n.11. There is consequently no merit to petitioners' contention that the FCC's preemption of California law transgresses principles of state sovereignty. See *id.* at A21; *City of New York* v. *FCC*, 486 U.S. at 63-64.[5]

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[5] Petitioners' contention (Pet. 10) that the FCC "ignored principles of federalism" is particularly ill-founded in light of the fact that the Commission narrowly tailored its preemption decision to accommodate the regulations established by the 47 other States that have implemented caller ID and various CPN-blocking regimes, and acquiesced in all but one of California's own rules. See Pet. App. A21 (noting that "the FCC substantially narrowed the scope of its preemption order" in its order upon reconsideration, and concluding that "[t]he FCC's preemption order satisfies the requirement that a preemption rule should be narrowly tailored to fit federal policies").

There is no basis for petitioners' suggestion (Pet. 10-11) that the court of appeals' decision conflicts with the Ninth Circuit's prior holding in *Air Transport Ass'n* v. *Public Utils. Comm'n of California*, 833 F.2d 200 (1987), cert. denied, 487 U.S. 1236 (1988). The court of appeals in that case held that a California statute requiring telephone carriers to discontinue service to customers found to have violated a state rule prohibiting call monitoring was not preempted by a provision of the Communications Act prohibiting discriminatory discontinuation of service. The case did not present any question concerning the FCC's authority to preempt a state rule that the Commission determines will undermine the federal regulatory scheme.

Petitioners also contend that preemption of state law is inappropriate here because the federal interests that would be threatened by California's default rule are "de minimis." Pet. 12. The Commission determined, however, that California's unique default policy would undermine two valid federal objectives: 1) fostering the availability of caller ID and other CPN-based services on interstate calls to and from California, and 2) promoting consumer choice as reflected in the Commission's carefully considered balance of the interests of the calling party in retaining the option to block CPN and the interests of the called party in receiving CPN absent the exercise of the caller's option. On the first point, the FCC cited record evidence suggesting that California's default policy was preventing deployment of caller ID and related services in California, thereby depriving all residents of and recipients of calls from that State of the benefits associated with the service. Pet. App. A136.[6] As to the second point, the FCC "determined that as a matter of federal policy, the called party should have access to incoming CPN unless the calling party has exercised his right not to have his

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[6] The court of appeals pointed out that some form of caller ID service was available in 47 States and the District of Columbia, but not in California. Pet. App. A11. Petitioners' contention (Pet. 11) that 93 percent of all calls made in California are intrastate provides no support for their contention that the impact of the California default rule upon federal policy would be de minimis. See *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036 (4th Cir.), cert. denied, 434 U.S. 874 (1977) (fact that telephone terminal equipment was used 97 percent of time for intrastate calls did not deprive FCC of authority to preempt state regulation that would defeat valid federal regulatory purpose).

CPN revealed." *Id.* at A139. California's default policy would upset that balance, depriving the called party of the benefits of caller ID even though the calling party had made no affirmative choice to block transmission of its CPN. The court of appeals considered the Commission's proffered justifications, see *id.* at A19-A21, and upheld its preemption regulation, observing that "[t]he FCC's preemption order satisfies the requirement that a preemption rule should be narrowly tailored to fit federal policies," *id.* at A21. That holding was correct and does not warrant this Court's review.

2. There is also no merit to petitioners' contention (Pet. 13-18) that the FCC's preemption order violates the constitutional privacy and free speech rights of California nonpublished subscribers.[7] The court of appeals correctly recognized that "[a] phone number is not among the select privacy interests protected by a federal constitutional right to privacy." Pet. App. A23. The court relied in substantial measure (see *id.* at A23-A24) on this Court's holding in *Smith* v. *Maryland*, 442 U.S. 735 (1979), that an individual has no Fourth Amendment right to prevent the disclosure of telephone numbers dialed from his home telephone. Since the advent of caller ID, two state supreme courts have relied on *Smith* in ruling that there is no federal constitutional right to privacy offering protection from disclosure of telephone numbers via

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[7] Petitioners' argument presumably would suggest that the 47 other States (and the District of Columbia) in which caller ID is available (see Pet. App. 11) are similarly violating the Constitution, since "California is the only state in the country to have adopted a per line blocking default for nonpublished customers" (Pet. 9).

caller ID. See *Ohio Domestic Violence Network* v. *Public Utils. Comm'n of Ohio*, 638 N.E.2d 1012, 1019 (Ohio 1994); *Southern Bell Telephone & Telegraph Co.* v. *Hamm*, 409 S.E.2d 775 (S.C. 1991). Another state supreme court has held that no federal constitutional privacy right prevents disclosure of an unlisted telephone number. *Saldana* v. *State*, 846 P.2d 604, 611-612 (Wyo. 1993). Petitioners do not cite or discuss those state cases, nor do they identify any court that has reached a contrary result.

Even if telephone subscribers possessed a constitutional right to prevent transmission of their telephone numbers to the parties they call, moreover, the FCC policy at issue here would not violate that right. Any caller can prevent disclosure of its telephone number via caller ID, either by choosing per line blocking or by dialing the appropriate prefatory numbers to block transmission of its CPN on individual calls. Failure to utilize either of those options effects a waiver of any conceivable right to prevent disclosure of CPN.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

October Term, 1995

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CALIFORNIA'S REPLY BRIEF

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CALIFORNIA'S REPLY BRIEF

ARGUMENT

I. Respondents Continue to Ignore the Fundamental Rights of Millions of American Citizens

Remarkably, respondents continue to ignore the crux of California's argument, neither mentioning nor disputing that the FCC's preemption order strips privacy protection from millions of nonpublished customers who will be *unaware* of CPN disclosure and blocking. Respondents' statement that "[a]ny caller can prevent disclosure of its telephone number via caller ID, either by choosing per line blocking or by dialing the appropriate prefatory numbers to block transmission of its CPN on individual calls," Opp. 10, is disingenuous at best. In the face of California's undisputed, unrebutted evidence, respondents' assumption that *all* callers will know how to protect their privacy is demonstrably false.[1]

II. The Questions Presented are Exceptionally Important

Respondents' argument that the questions presented are not of "recurring importance," Opp. 6, is simply wrong. The Court has never addressed whether principles of federalism preclude the FCC from preempting under the Communications Act state laws seeking to protect the public health,

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[1] Respondents also argue that "[e]ven if telephone subscribers possessed a constitutional right to prevent transmission of their telephone numbers, . . . [f]ailure to utilize either of those options effects a waiver of any conceivable right to prevent disclosure of CPN." Opp. 10. This argument runs afoul of the Court's repeated admonition that acquiescence in the loss of fundamental rights may not be presumed. *Johnson v. Zerbst*, 304 U.S. 450, 464 (1938), *citing Ohio Bell Tel. Co. v. Pub. Util. Comm'n*, 301 U.S. 292, 307 (1937).

safety and welfare. Moreover, the Court's resolution of this issue would obviously have a strong bearing on the FCC's ability to preempt state regulation in related contexts.[2]

The individual rights issues raised by this case are equally important. The Court has never determined whether, in the absence of a strong justification by the government, the governmentally-compelled disclosure of personal and identifying information which the speaker chooses not to reveal violates the First Amendment right not to speak or the First Amendment right to speak anonymously.[3] Similarly, the Court has not determined whether the government, without strong justification, may compel the disclosure of a citizen's nonpublished telephone number consistently with the citizen's right to the privacy of personal information.[4] The Court's resolution of these questions will significantly advance the

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[2] For example, may the FCC preempt state restrictions on abusive and fraudulent practices by telemarketers? May it preempt state laws authorizing parental blocking of calls to 900 numbers, such as telephone sex lines? May it preempt state zoning restrictions on the placement of personal communications services ("PCS") towers in public schoolyards, parks or heavily populated areas, particularly if the state found hazards to the public health or safety engendered by such towers?

[3] If the First Amendment only prohibits the compelled assertion of an ideological message and not the compelled disclosure of personal factual information, as respondents and the Ninth Circuit have suggested, it would presumably be permissible for the government, without significant justification, to compel a citizen to disclose to the general public her social security, credit card or bank account numbers, that her mother was an alcoholic, that her brother had AIDS, or that she was convicted of shoplifting as a teenager.

[4] The Court has found an enforceable privacy interest in names, home addresses and rap sheets. *Dept. of State v. Ray*, 502 U.S. 164 (1991); *DOD v. FLRA*, 510 U.S. ___, 114 S.Ct. 1006, 127 L.Ed.2d 325 (1994); *DOJ v. Reporters Committee*, 489 U.S. 749 (1989). There would appear to be no less an interest in nonpublished telephone numbers. *See Katz v. United States*, 389 U.S. 347, 351-352 (1968); *Whalen v. Roe*, 429 U.S. 589, 599 (1977).

content and scope of its negative free speech and informational privacy jurisprudence.

Moreover, the Court's resolution of the questions presented is of immense importance to the millions of citizens whose rights and expectations will be violated without their knowledge and consent if certiorari is denied. A denial of certiorari would cause the names, addresses and nonpublished telephone numbers of countless California citizens to be placed on telemarketing lists, direct mail marketing lists and other databases to be sold without limitation to individuals and businesses. It would cause many citizens repeatedly to receive intrusive, unwanted, annoying, harassing or exploitative contacts in their homes from individuals and businesses with access to those databases. And in some cases, it would provide information concerning their whereabouts to those who might seek to harm them. These concerns were acknowledged not only by the CPUC in its Caller ID decision, Pet. App. A190-A191, but also by the FCC in its decision below, *id.* at A150. That is why California is supported in this appeal by the nationwide association for social workers, major domestic violence victims groups and major consumer groups. Pet. ii.[5]

Respondents portray this as a one-state case, Opp. 6, but their view is too formalistic. Instead, the Court should concern itself with the significance of the issues, in the sense of how many people these questions affect. California's sixteen

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[5] Citizens facing such harm will include celebrities, public officials, CEOs, judges and civil servants, as well as victims of domestic violence and other forms of harassment, who are legitimately concerned about protecting their privacy and safety. They will include psychiatrists, psychotherapists, lawyers, doctors, social workers, parole officers, probation officers – people who make calls to potentially dangerous clients, patients and supervisees from their homes. And they will include particularly vulnerable people, such as the elderly, the disabled, the sick, the limited-English-speaking and children – people who are particularly entitled to have protection from exploitation.

million citizens living in households with nonpublished numbers constitute more people than the populations of the states of Alaska, Delaware, Hawaii, Idaho, Maine, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont and Wyoming *combined*, according to the 1990 census. *Compare Cooper v. Oklahoma*, ___ U.S. ___, ___ n. 16, 64 U.S.L.W. 4255, 4259 n. 16 (No. 95-5207 Apr. 16, 1996) (in which the Court properly granted certiorari to correct the unfair standard of proof for competency hearings in four states, though *only thousands* of criminal defendants will be subjected to such hearings in those states for the foreseeable future); *Patterson v. Lamb*, 329 U.S. 539, 541 (1946) (one-time ruling affecting the status and claims of *thousands* of draftees "called for our review"); *Scott v. Williams*, 434 U.S. 910 (1977) (opin. of White, J.) (observing that an important issue "which significantly affects a great number of persons" satisfies "normal standards governing the exercise of our certiorari jurisdiction").

III. Respondents Understate the Importance of the Federalism Question by Misrepresenting *Louisiana* and the Statutory Scheme

Arguing that this case fits neatly within the "impossibility exception" of *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n. 4 (1986), respondents contend that California's federalism claim must fail because "the interstate and intrastate aspects of the [FCC's] regulatory scheme cannot be separated." Opp. 5, 6. What respondents overlook is that California's privacy regulation is different *in kind* from the *economic* regulation of interstate telecommunications which Congress delegated to the FCC.

This Court has repeatedly made clear that state regulation of the public health, safety and welfare, even where such

regulation incidentally affects interstate commerce, is categorically distinct from impermissible state regulation of interstate commerce.[6] As the Court recently said in *West Lynn Creamery v. Healy*, 512 U.S. ___, 114 S.Ct. ___, 129 L.Ed.2d 157, 175 n. 21 (1994), *quoting H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 533 (1949): "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden, or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

The Court has also stated: " 'The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community.' When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of [the state]." *Breard v. Alexandria*, 341 U.S. 622, 640 (1951), *quoting Kovacs v. Cooper*, 336 U.S. 77, 83 (1949).

Thus, even assuming that Congress has the power to authorize the FCC to override a state's protection of the privacy rights of its citizens, a matter traditionally left to the states, Congress's legislative intent to do so must be unmistakably clear. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525

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[6] A Commerce Clause analysis is helpful here because if California's regulation does not substantially affect interstate commerce, *see United States v. Lopez*, 514 U.S. ___, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), then it is obviously outside the scope of the authority delegated by Congress to the FCC. A citizen's personal decision not to disclose private information does not substantially affect interstate commerce and, indeed, may not be commerce at all.

(1977), and cases there cited. No such unmistakable clarity appears here.

The cases generally cited for an expansive reading of the FCC's power to preempt under the Communications Act have all involved state limitations on *interconnection* with the nationwide telecommunications network. *See, e.g., North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 790 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976), *and other cases cited in Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, text at 374, 375 n. 4 (1986).

Here, however, the privacy protection required by California *in no way* limits interconnection with the nationwide network. *See Air Transport Ass'n v. Pub. Util. Comm'n of California*, 833 F.2d 200, 203, 206 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988), in which both the FCC and the Ninth Circuit expressly found that California privacy regulation applicable to both intrastate and interstate calls did not have a significant impact on federal interconnection requirements.

Moreover, the sole provisions in the Communications Act having anything to do with privacy make clear that state privacy requirements more restrictive than federal requirements are *not* intended to be preempted. *See* 47 U.S.C. §§ 227(e), 605(f).

Finally, California's argument raises the question of whether the Court should infer Congressional intent to authorize the FCC to regulate interstate telecommunications in a way that impinges upon fundamental rights. *See, e.g., Kent v. Dulles*, 357 U.S. 116, 128-130 (1958).

IV. The Asserted Federal Interests are De Minimis

The federal interests asserted by respondents as justifying the FCC's preemption order are: (1) "fostering the availability of . . . CPN-based services on interstate calls to and from California," and (2) "promoting consumer choice." Opp.

8. Neither of these interests is adversely impacted, let alone negated, by California's rule.

The compelled nonconsensual disclosure of nonpublished telephone numbers is not necessary to foster the availability of CPN-based services to and from California. First, California's blocking rules are inapplicable on interstate calls *to* California, and California carriers have publicly committed themselves to offering Caller ID service in the state and have begun signing up customers.[7]

Second, the use of California's per line blocking default on interstate calls *from* California will have little or no effect on the availability of CPN-based services *nationwide*. The FCC's assertion that the development and profitability of Caller ID services *nationwide* is impaired by California's mechanism to protect the privacy of its citizens rests on its statement that "[i]n 1993, California accounted for more than 36 billion interstate calling minutes." Pet. App. A138 n. 124, *citing Statistics of Communications Common Carriers* (FCC, 1994), at p. 22. The misleading nature of the FCC's claim is confirmed by looking at its source. *See* Appendix ("App.") hereto.

While the FCC's table does suggest that California accounted for more than 36 billion interstate telephone call minutes in 1993 – approximately 10.4 percent of the indicated national total – an analysis focusing on the telephone call minutes that involve California's default rule confirms that *only 1.25 percent* of interstate minutes nationwide involve the "safety net" protection of California's per line blocking

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[7] Having expended the sunk costs of CPN blocking and education in order to comply with the FCC's requirement of CPN passage, the deployment of highly lucrative Caller ID service at this juncture is essentially without cost to the carriers.

default.[8] California's default rule hardly constitutes the *negation* of federal interstate policy asserted by respondents.

Indeed, the most striking statistic derived from the FCC's table is that in 1993, there were nearly twice as many *intrastate* telephone calls made in California (68+ billion) as there were *interstate* telephone calls made in *the entire United States* (38+ billion)! A denial of certiorari would plainly leave a very thin interstate tail wagging a very substantial intrastate dog.

Similarly, respondents' second asserted federal interest – promoting customer choice – is in no way negated by California's default rule. The FCC's requirement that per line blocking be subject to a *82 override feature "ensures the free transmission of CPN on a per call basis, at the election of the calling party," Pet. App. A134, and "preserves a consumer's ability to choose when to reveal and when to conceal CPN," *id.* Accordingly, the *82 override feature and California's requirement granting all customers one free change of blocking option on request, Pet. App. A215-A216, ensure that anyone with actual awareness of CPN disclosure and blocking will have a choice. California's default is necessary, however,

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[8] The figure cited by the FCC refers to minutes on both *originating* and *terminating* calls. App. 2. However, since California's blocking regime *only* applies to calls *originating* in California, the figure is significantly overstated. If it is reasonably assumed that 50 percent of the interstate minutes involve originating interstate calls, then *only 5.1 percent* of the nation's interstate minutes involve California's blocking regime. Moreover, since 50 percent of California's residential customers are nonpublished customers, it is reasonable to assume that *only 2.5 percent* of the nation's interstate minutes involve calls initiated by such customers. Finally, if it is assumed that that 50 percent of nonpublished subscribers are informed about disclosure and blocking and consequently either communicate a choice of blocking option to the telephone company or make a choice by letting the default of which they are aware take effect, then *only 1.25 percent* of interstate minutes nationwide involve the "safety net" protection of California's per line blocking default for nonpublished customers.

to protect the right to choose of nonpublished subscribers without such awareness.

Respondents make much of the FCC's supposed balancing of the interests of called parties against the interests of calling parties, Opp. 2, 8, but they ignore the fact that the advent of Caller ID alters the *status quo* by *increasing* the privacy of called parties while *decreasing* the privacy of calling parties. Pet. App. A195. Respondents' statement that "California's default policy would upset that balance, depriving the called party of the benefits of caller ID even though the calling party had made no affirmative choice to block transmission of its CPN," Opp. 9, simply ignores the issue. Respondents have never explained why federal policy requires the surreptitious appropriation and disclosure to the general public of the nonpublished telephone numbers of American citizens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

EXCERPTS FROM STATISTICS OF COMMUNICATIONS COMMON CARRIERS (FCC, 1994), AT PAGE 22, CITED BY THE FCC IN ITS RECONSIDERATION ORDER, PET. APP. A138 N. 124

STATISTICS OF COMMUNICATIONS COMMON CARRIERS

(LOGO)

Federal Communications Commission
1993/1994 Edition

TABLE 2.6 – TELEPHONE CALLS AND MINUTES FOR REPORTING LOCAL EXCHANGE COMPANIES – YEAR ENDED DECEMBER 31, 1993
(FIGURES SHOWN IN THOUSANDS)

STATE	LOCAL CALLS	INTRALATA TOLL CALLS COMPLETED (ORIGI-NATING)	INTERLATA TOLL CALLS COMPLETED (ORIGINATING)			INTERLATA BILLED ACCESS MINUTES (ORIGINATING AND TERMINATING)		
			INTERSTATE	INTRASTATE	TOTAL	INTERSTATE	INTRASTATE	TOTAL
CALIFORNIA	55,516,432	8,463,610	5,407,552	4,069,140	9,476,691	36,488,037	25,705,197	62,193,234
UNITED STATES	444,710,879	23,437,234	38,679,958	15,317,747	53,997,703	349,553,992	114,247,769	463,801,783